TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 70

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, DANVILLE, ILLINOIS, AND THE VETERANS' ADMINISTRATION, PETITIONERS

vs.

HARVEY M. WOOD, AS ADMINISTRATOR OF THE ESTATE OF WALTER SEARLES, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 19, 1936
CERTIORARI GRANTED OCTOBER 12, 1936

SUPREME COURT OF THE UNITED STATES

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1 Pleas in the District Court of the United States within and for the Eastern District of Illinois at a special term thereof, begun and held in the United States Court Room, in the City of Danville in said district, before the Honorable Walter C. Lindley, Judge of said Court on the first Monday of November, in the year of our Lord one thousand nine hundred and thirty four, and of the Independence of the United States of America, the one hundred and fifty-ninth year. Placi

D. H. REED,
Clerk.

Harvey M. Wood, as Administrator in the Estate of Walter Searles, Dec'd.

vs.

The National Home for Disabled Volunteer Soldiers, Danville, Illinois, the Veterans Administration Home of Danville, Illinois, Ralph W. Jones, as Accountant of said Veterans Administration Home, Danville, Illinois and Walter T. Christy, as Special Disbursing Agent of said Veterans Administration Home, Danville, Illinois and Ralph W. Jones, Treasurer of National Home for Disabled Volunteer Soldiers, Danville, Illinois.

} Law No. 247-D.

Be it remembered that heretofore, to-wit: on the 16th day of September, A. D. 1931, came E. L. McLaughlin and Ray M. Foreman, Attorneys for Harvey W. Mood, as Administrator in the Estate of Walter Searles, Deceased, plaintiff herein and filed in the office of the Clerk of the United States District Court for the Eastern District of Illinois, a Petition to prosecute as a poor person, in a cause entitled Harvey M. Woods, as Administrator, in the Estate of Walter Searles, deceased *vs.* The National Home for Disabled Volunteer Soldiers, Danville, Illinois, the Veterans Administration Home of Danville, Illinois, Ralph W. Jones, as Accountant of

said Veterans Administration Home, Danville, Illinois
2 and Walter T. Christy as Special Disbursing Agent of said Veterans Administration Home, Danville, Illinois and Ralph W. Jones, Treasurer of National Home for Disabled Volunteer Soldiers, Danville, Illinois, Law No. 247-D, which said Petition was and now is in words and figures, the following to wit:

3 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Eastern District of Illinois.

Harvey M. Wood, as Administrator in the Estate of Walter Searles, deceased. *vs.* The National Home for Disabled Volunteer Soldiers, Danville, Illinois, the Veterans Administration Home of Danville, Illinois, Ralph W. Jones, as Accountant of said Veterans Administration Home, Danville, Illinois and Walter T. Christy, as Special Disbursing Agent of said Veterans Administration Home, Danville, Illinois and Ralph W. Jones, Treasurer of National Home for Disabled Volunteer Soldiers, Danville, Illinois.	No. 247-D.

APPLICATION FOR LEAVE TO INSTITUTE AND PROSECUTE SUIT AS A POOR PERSON.

HARVEY M. WOOD, being first duly sworn on oath, deposes and says that he is a resident of the City of Danville, County of Vermilion, State of Illinois, and has been for the last two years next preceding the filing of this application; that he was upon the 12th day of March A. D. 1931, duly appointed the administrator of the estate of Walter Searles, deceased, in the probate court, County of Vermilion, State of Illinois; that this affiant was appointed administrator upon

the request of one of the creditors of said Walter Searles, deceased;

That your affiant finds that the said Walter Searles, deceased, left no property whatsoever save and excepting a certain sum of money of approximately Four Thousand ($4000.00) Dollars, which sum of money is now, so your affiant is informed and believes, in the hands of Walter T. Christy, Special Disbursing Agent of the Veterans Administration Home at Danville, Illinois; that said sum of money represents the proceeds of pension moneys which had accrued to the said Walter Searles prior to his decease; that said Walter T. Christy, Special Disbursing Agent of the Veterans Administration Home at Danville, Illinois; on the basis that said sums of money belong to and have vested in the general fund of the Veterans Administration Homes of the United States War Veterans, in accordance with Sections 136
4 and 139 of Chapter 3, Title 24 of the Code of Laws of the United States of America as in force December 6, 1926, whereas said fund belongs to this affiant as administrator of the estate of the said Walter Searles, deceased, for the benefit of the sole heir at law of the said Walter Searles, deceased, said heir at law being one Herbert A. Searles of Spokane, Washington; that your affiant is of the opinion and verily believes that said moneys belong to and are the property of this affiant by virtue of said Section 136, Chapter 3, Title 24 of said Code of Laws of the United States of America, in force December 6, 1926, and that such moneys will be recovered from the said Walter T. Christy, Special Disbursing Agent of the Veterans Administration Home at Danville, Illinois, if this affiant be permitted to institute suit in this court for the recovery of the same;

That this affiant has no money or other property whatsoever which has accrued to him from the estate of the said Walter Searles, deceased, by which or from which he might pay the costs for instituting said suit in this court; that this affiant is a poor person and unable to pay said costs himself as administrator, and that this affiant believes that he has a meritorious cause of action against the said Walter T. Christy, Special Disbursing Agent of the Veterans Administration Home at Danville, Illinois,

Wherefore, this affiant requests this court to permit this affiant to institute suit in this court in his name as Harvey M. Wood, Administrator in the estate of Walter Searles, deceased, and against The National Home for Disabled Volun-

teer Soldiers, the Veterans Administration Home, of Danville, Illinois, Ralph W. Jones, Accountant of said Veterans Administration Home, Danville, Illinois, and Walter T. Christy, Special Disbursing Agent of said Veters Administration Home, Danville, Illinois, and Ralph W. Jones, Treasurer of National Home for Disabled Volunteer Soldiers, Danville, Illinois, said suit to be instituted by this person against said persons without the pre-payment of the usual costs or fees incidental to the filing and prosecution of such suit in this court.

HARVEY M. WOOD.

Subscribed and sworn to before me this ..... day of September A. D. 1931.

HELEN M. SADLER,
Notary Public.

(Seal)

5 Endorsed: * * (Caption—247-D) * *. Application for Leave to Institute and Prosecute Suit as a Poor Person. Filed Sep. 16, 1931, Douglas H. Reed, Clerk. Law Offices, E. L. McLaughlin and Ray M. Foreman. Danville, Illinois.

6 Endorsed: * * (Caption—247-D) * *. Application for Leave to Institute and Prosecute Suit as a Poor Person. Filed Sep. 16, 1931, Douglas H. Reed, Clerk. Law Offices, E. L. McLaughlin and Ray M. Foreman, Danville, Illinois.

7 And on the same day, to-wit: the 16th day of September, A. D. 1931, the following proceedings were had in said Court in said Cause and entered of record, to-wit:

8 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—247-D) * *

ORDER.

Upon consideration of the application for leave to institute and prosecute suit as a poor person in the case herein, at this time presented to this Court, the Court finds that the plaintiff herein is a poor person and has a meritorious cause of action against the defendants herein and it is hereby Ordered by this Court that the said plaintiff herein be permitted to institute and prosecute his suit against the defendants herein as a poor person and shall not be required to prepay filing

fees or any and all other court costs or marshals fees necessary for the institution and prosecution of his said suit.

WALTER C. LINDLEY,
Judge.

Endorsed: * * (Caption—247-D) * *. Order. Ent. Sept. 16, 1931, D. H. Reed, Clerk.

9 And afterwards, on to-wit: the 26th day of February, A. D. 1932, there was filed in the office of the Clerk of said Court in said Cause, a Declaration, which said Declaration, was and now is in words and figures following, to-wit:

10 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—247D) * *

DECLARATION.

Harvey M. Wood, as Administrator of the Estate of Walter Searles, deceased, Plaintiff by Ray M. Foreman and Eldon L. McLaughlin, his attorneys, complains of the National Home for Disabled Volunteer Soldiers, Danville, Illinois, Veterans Administration Home, Danville, Illinois, Ralph W. Jones, as accountant of said Veterans Administration Home, Danville, Illinois, Walter T. Christy, as Special Disbursing Agent of said Veterans Administration Home, Danville, Illinois, and Ralph W. Jones, Treasurer of the said Veterans Administration Home, Danville, Illinois, Defendants, in a plea of trespass on the case on promises and avers that the plaintiff is a citizen and resident of the State of Illinois, and that the defendant, the National Home for Disabled Volunteer Soldiers, Danville, Illinois, is a corporation created under the authority of the Congress of the United States and is located at or near the City of Dayton, Ohio; with a Branch of said corporation at Danville, Illinois, which said corporation was by Act of Congress approved upon July 3, 1930 dissolved and all its duties, obligations, rights, powers, etc. transferred to the Veterans Administration of the City

11 of Washington, District of Columbia, as a part of the Government of the United States; that the Veterans Administration Home of Danville, Illinois is a part of the Veterans Administration, City of Washington, District of Columbia, created and existing by virtue of the Act of Congress

approved July 3, 1930 and by virtue of such Act is the successor to the National Home for Disabled Volunteer Soldiers, and the Danville Branch thereof; that the defendant, Ralph W. Jones is a citizen and resident of the State of Illinois and was upon September 17, 1926, Treasurer of the Branch of the National Home for Disabled Volunteer Soldiers, Danville, Illinois, and as such Treasurer had in his custody and under his control, all of the funds of the said Branch of the National Home for Disabled Volunteer Soldiers, Danville, Illinois, and particularly the funds in controversy in this cause, and the said Ralph W. Jones is at present the accountant of the said Veterans Administration Home of Danville, Illinois and as such accountant he has in his custody and under his control all funds formerly in the custody or under the control of the Treasurer of the National Home for Disabled Volunteer Soldiers, Danville, Illinois and particularly the funds in controversy in this cause; that Walter T. Christy is a citizen and resident of the State of Illinois and is the Special Disbursing Agent of the Veteran's Administration Home, Danville, Illinois; that as such special disbursing agent is the successor in office to the former treasurer of the former Branch of the National Home for Disabled Volunteer Soldiers Danville, Illinois and has in his custody and under his control all the funds of the said Veterans Administration Home, Danville, Illinois which had formerly been in the custody and possession of said Ralph W. Jones as Treasurer of the said Branch of said National Home for Disabled Volunteer Soldiers, Danville, Illinois and particularly the funds in controversy in this cause;

12 And the Plaintiff further avers that this is a suit of a civil nature and that the amount involved in this suit is more than $3,000.00 exclusive of interests and costs and arises under and by virtue of the laws and statutes enacted by the Congress of the United States of America, in particularly Section 136, Title 24 of the Code of Laws of the United States of America, in force December 6, 1926.

And the Plaintiff further avers that the decedent Walter Searles, during all times hereinafter mentioned and up to the time of his death, was an honorably discharged volunteer soldier of the Civil War and a member of the late Company #E 19th Michigan Infantry, discharged July 16, 1865;

And the Plaintiff further avers that the said decedent died on or about September 16, 1926 and that prior to such decease, the decedent was a duly enrolled and recognized pen-

sioner under the laws of the United States and continued so to be up to and including the day of his death, to-wit: September 16, 1932 and as such pensioner was entitled to be paid and was paid as hereinafter set forth the full amount of his pension money so granted him as such disabled volunteer soldier until the date of his death as hereinabove set forth.

And the plaintiff further alleges that on or about October 19, 1924 the said deceased made application for membership and afterwards became a member of the Branch of the National Home for Disabled Volunteer Soldiers, Danville, Illinois, now known as Veteran Administration Home, Danville, Illinois and afterwards became a member of said Home and continued so to be an inmate and member of said Home until the date of his death, September 16, 1926.

13 And the Plaintiff further avers that on the date of the death of said decedent he left as his sole and only surviving heir at law his son, Herbert A. Searles, a citizen and resident of Spokane, State of Washington, said son being still living.

And the Plaintiff further avers that during all or most of the time the date on which said Walter Searles, deceased, became an inmate of said Branch of the National Home for Disabled Volunteer Soldiers, Danville, Illinois, to the date of his death, to-wit: September 16, 1926, the pension money granted and allowed him under the Pension laws of the United States was paid in quarterly or monthly payments and in accordance with the existing laws of the United States relating to the payment of pensions to disabled volunteer soldiers as inmates and members of such Branch of the National Home for Disabled Volunteer Soldiers, Danville, Illinois to the treasurer and superintendent of the post fund of said Branch of the National Home for Disabled Volunteer Soldiers, at Danville, Illinois for the use and benefit of the said Walter Searles, deceased, which said pension money so received by the said Treasurer or superintendent was placed to the credit of said Walter Searles, deceased, upon the books of said Branch of National Home for Disabled Volunteer Soldiers, Danville, Illinois and part of such funds so credited to the account of said Walter Searles, deceased, as aforesaid was paid over to the said Walter Searles, deceased, as he had need therefor and part of said funds were paid over to the son of Walter Searles, deceased, namely the said Herbert A. Searles for the expenses of a certain trip incurred by said Herbert A. Searles from Spokane, Washington, at or after the date of the death of said Walter Searles, deceased.

And the Plaintiff further avers that after deducting all just credits and set offs, there remained at the time of the death of said Walter Searles, deceased, in the hands of said Treasurer of the said National Home for Disabled Volunteer Soldiers, Danville, Illinois for the use of and benefit of said Walter Searles, deceased, or his next of kin or heirs at law, or in the hands of the successor in office to the then Treasurer of the Branch of the National Home for Disabled Volunteer Soldiers, the sum of $3,300.00, all of which sum plus legal interest thereon still remains in the hands of the aforesaid defendants or their successors in office or their successors to the duties, rights and obligations such as pertain to the care and custody aforesaid of the sum of money received by said officials for the use and benefit of said Walter Searles, deceased, as aforesaid.

And the Plaintiff further avers that at the time of the death of Walter Searles, deceased, the said Walter Searles, deceased, left no Will in Writing or otherwise nor entered into any express contract making any disposition in any manner of money, or of property either real, personal or mixed, of which he might die seized.

And the Plaintiff further avers that neither at the time the said Walter Searles, deceased, became an inmate and member of said Branch of the National Home for Disabled Volunteer Soldiers, Danville, Illinois, nor at any time afterwards did said Walter Searles, deceased, make or agree to make any assignment or contract either expressed or implied relating to the disposition of any property, real, personal or mixed of which he might die seized in the event that he left any heirs at law or next of kin on the date of his decease.

And the Plaintiff further avers that he has made due and proper demand upon the defendants and each of them, as in such case by law required, for the money, property and effects of the said Walter Searles, deceased, which remained in the hands of said defendants upon the death of said Walter Searles, deceased, but that the defendants and each of them refused and still refuse to turn over any and all money, property or effects in their hands to this plaintiff but continue to retain the same to their use and benefit.

And the plaintiff further avers that under and by virtue of laws of descent and distributions of the state of Illinois in full force and effect on the day of the death of the said Walter Searles, deceased, to-wit: September 16, 1926 and for a long time prior to the establishment of the said Branch of the Na-

tional Home for Disabled Volunteer Soldiers, Danville, Illinois, all of the estate of said Walter Searles, deceased, situated and being in the State of Illinois became subject to and governed by the laws of the State of Illinois relating to the estates of deceased persons in said State who die intestate.

And the plaintiff further avers that under and by virtue of the laws of the United States Government all personal property owned by a pensioner at the time of his death including money or choses in action held by him and not disposed of by Will, whether such property be the proceeds of pensions or otherwise derived shall, in the event that said pensioner leave at his death no heirs at law nor next of kin, vest in and become the property of the Board of Managers, subject to be reclaimed by any legatee or person entitled to take the same by inheritance.

And the plaintiff further avers that he is the duly appointed and qualified administrator of the Estate of Walter Searles, deceased and as such Administrator is entitled to sue for the recovery of all of said funds or moneys in the hands of the defendants for the use and benefit of said Walter Searles, deceased, his heirs at law or next of kin, of which heirs at law or next of kin there is living at present one son of
16 the said Walter Searles, deceased, by name, Herbert A. Searles.

And the plaintiff further avers that by means of the aforesaid the defendants have become liable to pay to the plaintiff the aforesaid sum but although being so liable as aforesaid to pay the said sum the defendants have not paid the same nor any part thereof to the plaintiff but refuse so to do to the damage of the plaintiff to-wit: $4,000.00 and therefore he brings his suit, etc.

Second Count.

For that Whereas also Harvey M. Wood, as Administrator of the Estate of Walter Searles, deceased, plaintiff, is a citizen and resident of the State of Illinois, and that the defendant, the National Home for Disabled Volunteer Soldiers, Danville, Illinois, is a corporation created under the authority of the Congress of the United States and is located at or near the City of Dayton, Ohio; with a branch of the said corporation at Danville, Illinois, which said corporation was by Act of Congress approved upon July 3, 1930, dissolved and all its duties, obligations, rights, powers, etc. transferred

to the Veterans Administration City of Washington, District of Columbia, as a part of the Government of the United States; that the Veterans Administration Home of Danville, Illinois is a part of the Veterans Administration, City of Washington, District of Columbia, created and existing by virtue of the Act of Congress approved July 3, 1930 and by virtue of such Act is the successor to the National Home for Disabled Volunteer Soldiers, and the Danville Branch thereof; that the defendant, Ralph W. Jones is a citizen and resident of the State of Illinois and was upon September 17, 1926, Treasurer of the Branch of the National Home for
17 Disabled Volunteer Soldiers, Danville, Illinois, and as such Treasurer had in his custody and under his control, all of the funds of the said Branch of the National Home for Disabled Volunteer Soldiers, Danville, Illinois, and particularly the funds in controversy in this cause, and the said Ralph W. Jones is at present the accountant of the said Veterans Administration Home of Danville, Illinois and as such accountant he has in his custody and under his control all funds formerly in the custody or under the control of the Treasurer of the National Home for Disabled Volunteer Soldiers, Danville, Illinois and particularly the funds in controversy in this cause; that Walter T. Christy is a citizen and resident of the State of Illinois and is the Special Disbursing agent of the Veterans Administration Home, Danville, Illinois; that as such special disbursing agent is the successor in office to the former Treasurer of the former branch of the National Home for Disabled Volunteer Soldiers, Danville, Illinois and has in his custody and under his control all the funds of the said Veterans Administration Home, Danville, Illinois which had formerly been in the custody and possession of said Ralph W. Jones as Treasurer of said Branch of said National Home for Disabled Volunteer Soldiers, Danville, Illinois and particularly the funds in controversy in this cause; and whereas plaintiff further avers that this is a suit of a civil nature and that the amount involved in this suit is more than $3,000.00 exclusive of interests and costs and arises under and by virtue of the laws and statutes enacted by the Congress of the United States of America, in particularly Section 136, Title 24 of the Code of Laws of the United States of America, enforced December 6, 1926.

And For That, Whereas, heretofore, in the lifetime of said Walter Searles, the defendants, on to-wit: September 17,

1926, in the County of Vermilion, and State of Illinois became and was indebted to the said Walter Searles in the sum of $4,000.00 for money before that time lent by the said Walter Searles to the defendant at his request; and in the like sum for money before that time paid and expended by the said Walter Searles for the use of the defendants at his
18 request; and in a like sum of money before that time received by the defendants for the use of said Walter Searles; and in a like sum for interest on divers sums of money before that time forborne by the said Walter Searles to the defendants at his request, for the divers spaces of time before then elapsed; and, being so indebted, the defendants, in consideration thereof, then and there promised the said Walter Searles to pay him, on request, the several sums of money so due to him as aforesaid; yet the defendants though requested, have not paid the same, or either of them, or any part thereof, to the said Walter Searles, in his lifetime nor to the plaintiff since the death of the said Walter Searles, but refuse so to do, to the damage of the plaintiff of Four Thousand Dollars ($4,000.00), and therefore, he brings his suit, etc.

HARVEY M. WOOD, as Admstr. of the estate of Walter Searles, deceased.

RAY M. FOREMAN,
ELDON L. MCLAUGHLIN,
Attorneys for Plaintiff.

Endorsed: * * (Caption—247D) * * Declaration. Filed Feb. 26, 1932, Douglas H. Reed, Clerk. Ray M. Foreman and Eldon L. McLaughlin Danville, Illinois.

19 And afterwards, on to-wit: the 8th day of February, A. D. 1934, there was filed in the office of the Clerk of said Court in said Cause, a Stipulation of Facts, which said stipulation was and now is in words and figures following, to-wit:

20 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—247-D) * *

STIPULATION OF FACTS.

It is hereby stipulated by and between the above entitled parties by their respective attorneys that:

(1) That Walter Searles was an honorably discharged volunteer soldier of the War of the Rebellion and a member of Company E 19th Regiment, Michigan Infantry and that he died September 16, 1926 while an inmate and member of the Danville Branch of the National Home for Disabled Volunteer Soldiers, a corporation, located at Danville, Illinois.

(2) That Walter Searles, deceased, left him surviving one only son and heir at law, to-wit: Herbert A. Searles, then aged fifty-three years, who resides at Spokane, Washington, of which state he is a citizen and a resident.

(3) That Harvey M. Wood, is the duly qualified and acting administrator of the estate of Walter Searles, deceased and is the plaintiff in this suit.

(4) That the National Home for Disabled Volunteer Soldiers, Danville, Illinois, is a branch of the National Home for Disabled Volunteer Soldiers, a corporation, created by an Act of Congress of the United States, having its headquarters at Dayton, Ohio, the said Danville Branch being
21 a part of said corporation and under the management and control of the same. That Ralph W. Jones was the Treasurer of said Danville Branch of the National Home for Disabled Volunteer Soldiers, located at Danville, Illinois prior to and at the time of the death of said Walter Searles, and continued as such Treasurer until the aforesaid corporation became dissolved by an Act of Congress approved July 3, 1930, and as such Treasurer had or has in his custody and under his control the funds of said Danville Branch of the National Home for Disabled Volunteer Soldiers, and particularly the funds involved in this case. That Ralph W. Jones is the accountant of the Veterans Administration Home located at Danville, Illinois, a branch of the Veterans Administration of the United States of America, created by an Act of Congress approved on July 3, 1930 and the successor to the former National Home for Disabled Volunteer Soldiers, a corporation, and subject to and possessed of all the duties, obligations, rights, powers, etc. formerly pos-

sessed by the said National Home for Disabled Volunteer Soldiers, a corporation, and that the said Ralph W. Jones as accountant of said Veterans Administration Home of Danville, Illinois is successor in office to a part of the duties formerly discharged by the Treasurer of the Danville Branch of the National Home for Disabled Volunteer Soldiers, a corporation, and as such accountant has custody of a part of the funds of the Veterans Administration, Danville, Illinois. That Walter T. Christy is the Special Disbursing Agent of the Veterans Administration as aforesaid, and as such special disbursing agent is the successor in office to a part of the duties formerly discharged by the Treasurer of the Danville Branch of the National Home for Disabled Volunteer Soldiers and as such successor in office and special disbursing agent he has in his custody and under his control the
22 funds of the Veterans Administration Home, Danville, Illinois, and in particular, of the funds in controversy.

(5) That Walter Searles deceased, was enrolled and recognized as a pensioner under the laws of the United States about the year 1904, and as such pensioner was entitled to receive a pension up to and including the date of his death, September 16, 1926; that said Walter Searles was at various times until his death a member of the several branches of the National Home for Disabled Volunteer Soldiers located in the several places and cities of the United States, and from time to time received his aforesaid pension money from the various Treasurers of the respective branches in which, at the several times, he was a member. That prior to October 17, 1924 Walter Searles applied for admission to the Danville Branch of the National Home for Disabled Volunteer Soldiers, located at Danville, Illinois and was duly enrolled as a member thereof upon October 19, 1924; and that at the time of said admission, said Walter Searles was approximately 81 years of age.

(6) That shortly prior to October 17, 1924 and until September 16, 1926, the date of the death of said Walter Searles, the pension money granted and allowed to Walter Searles, deceased, under the pension laws of the United States, was paid in installments of $72.00 per month according to the laws of the United States existing from time to time during said period relating to the payments of pension money to Disabled Volunteer Soldiers who were members of the National Home for Disabled Volunteer Soldiers; that in accordance with said laws, said pension money was paid to the

Treasurer of the Danville Branch of the National Home for Disabled Volunteer Soldiers at Danville, Illinois to be disbursed to the said Walter Searles or for his benefit. That at the time of the death of the said Walter Searles there was a balance of pension money due him from the Treas-
23 urer of the United States for a part of the month of September 1926, to-wit September 4, 1926 to September 15, 1926 inclusive, amounting to the sum of $8.80; That at the time of the death of said Walter Searles, September 16, 1926, there was on deposit to the credit of Walter Searles now deceased, with the Treasurer of the Danville Branch as aforesaid, pension money paid to the said Treasurer as aforesaid as and for the pension of Walter Searles a sum of money amounting to approximately Eighteen Hundred dollars ($1800.00) of which sum there has been paid to the said Herbert A. Searles, the son of the said Walter Searles, deceased, as and for expenses in making a trip from his residence at Spokane, Washington to Danville, Illinois and back, after attending the funeral of his father, the said Walter Searles, the sum of approximately $200.00, and there has also been paid out of said sum to the sister of said Walter Searles, the sum of approximately $50.00 for expenses in making a trip to and from Richland, Michigan, the residence of said sister of Walter Searles, deceased, to Danville; that in addition to said expenditures made from said sum there was deducted from the pension moneys received by the Treasurer of said Danville Branch between August 17, 1924 and September 16, 1926, various small sums of money in accordance with the orders drawn therefor by the Chief Surgeon of the Danville Branch as aforesaid, said sums of money being used for extra expenses for the said Walter Searles while in the hospital at the said Danville Branch as aforesaid; that there is now remaining on deposit after deductions of the aforesaid amounts to the credit of said Walter Searles, deceased, with the Treasurer of the Danville Branch as aforesaid or to his successor in office or to the President of the Board of Managers of the National Home for Disabled Volunteer Soldiers, a corporation, or its successor, the Veterans Administration, the sum of Fifteen hundred forty six and 47/100 Dollars
24 ($1546.47 plus interest thereon at five (5%) per cent per annum since October 1, 1926, of which said sum and the interest thereof, no part had or has been paid to the said Walter Searles, deceased, nor to his only son and heir at law, Herbert A. Searles, nor to the Administrator of Walter

Searles, Deceased, plaintiff herein, nor to any other person for the benefit of the heirs at law or next of kin of the said Walter Searles, deceased;

(7) That the said Walter Searles died intestate at Danville, Illinois, of which state he was at the time of his death a resident and citizen, and that under the laws of descent and distribution of the State of Illinois, his personal property would go to his son and only heir at law, Herbert A. Searles, for whose use the suit herein is being prosecuted by this plaintiff as administrator of the Estate of said Walter Searles, there being no debts in the estate of Walter Searles. That the said Herbert A. Searles, the only child and heir at law of said Walter Searles, Deceased, is now approximately 53 years of age, and is not a minor child, but that said Herbert A. Searles had been up to and until the date of the death of said Walter Searles, a dependent of the said Walter Searles, the said Herbert A. Searles having suffered when but a baby, a severe rupture or hernia, which has incapacitated him from such date until the present time from doing the ordinary manual labor necessary to make a living for himself; that the said Herbert A. Searles has not been qualified by education or otherwise to earn a living; that the said hernia on the body of said Herbert A. Searles has rendered him permanently dependent upon others for financial support; that the said Walter Searles, deceased, did at various times send or pay to his son, Herbert A. Searles, the pension moneys received by him; that the said Walter Searles, deceased, did at various times state to his son, Herbert A. Searles, and to others, that he considered his son dependent upon him for support; that the said Walter Searles at various times declared, both to the said Herbert A. Searles and to others, that he intended that all of his pension moneys which he might leave in any wise, or any balance of pension moneys that might be due him in any wise, should go to his son, the said Herbert A. Searles, for the support of the said Herbert A. Searles.

(8) That upon the 23d day of March, A. D. 1931 there was sent to the Veterans Administration, Bureau of National Homes, Washington, D. C. in the names of Harvey M. Wood, Administrator in the Estate of Walter Searles, deceased, and Herbert A. Searles, a petition for the allowance to said parties of the sums of money remaining in the hands of the Veterans Administration or its proper officials, as accrued pension moneys (or pension moneys) due Walter Searles, de-

ceased, at the date of his death, and a demand that such moneys be turned over to such petitioners, including as a part of said petition and demand a statement of facts substantially as set forth herein and an assertion of claim under various sections of the Statutes and Laws of the United States in force at the time said Walter Searles became deceased, and in force at the date of such petition and demand; and that upon the 25th day of March, 1931, C. W. Wadsworth, Director of said Veterans Administration did in behalf of said Veterans Administration, acknowledge receipt of such petition and demand and deny allowance thereof; that in addition to the aforesaid petition and demand, other petitions and demands for said pension funds were made upon the officers of the National Home for Disabled Volunteer Soldiers immediately and within one year following the death of the said Walter Searles, by said Herbert Searles, his legal heir.

(9) That no conservator or guardian had or has ever in the lifetime of said Walter Searles, deceased, been appointed by any Court of competent jurisdiction over the person or the estate of the said Walter Searles, now deceased.

(10) That the following rules and regulations concerning the disbursement of pension funds in the hands of the branch treasurer were in effect at the time of the death of Walter Searles, to-wit:

"Home Regulations.

"253. Pension money held by a Branch Treasurer will be paid to, and on account of, a pensioner, subject to the following rules and regulations:

First: A pensioner not classed as incompetent may direct, in writing, that all or any portion of his pension money be sent to his wife, minor child, or a dependent relative.

Second: The Governor of a Branch may prevent a hurtful or wasteful or extravagant use of the pension money in any case by retaining a sufficient amount until, in his opinion, the danger of harm or waste or extravagance has passed.

Third: Pension money standing to the credit of a member sick in hospital will be paid directly to him in such amounts only as are necessary for his personal use. Upon his order payments may be made to liquidate his indebtedness or otherwise protect his interests.

Fourth: In the case of a member classed by the Surgeon as 'incompetent', payment of his pension money may be made as follows:

(a) To the Surgeon in such small sums as may be necessary for the personal expenses of the member.

(b) To a wife, minor child, or dependent relative, upon the authority of the President of the Board of Managers. The evidence upon which any such payment is made will be filed with the retained copy of the first voucher so paid.

27 (c) To pay taxes, insurance, or other charges, when necessary to protect the interests of the member.

Fifth: Any balance due the pensioner when discharged from the Home or dropped from the rolls shall be paid to him."

(11) That the said Walter Searles did upon the date of his admission to the Danville Branch of the National Home for Disabled Volunteer Soldiers sign the following agreement, which continued in effect until the date of his death:

"I agree that in the event of my death while a member of the National Home for Disabled Volunteer Soldiers, leaving no heirs or next of kin, all personal property owned by me at the time of my death, including money or choses in action held by me and not disposed of by will, whether such property be the proceeds of pension or otherwise derived, shall vest in and become the property of the Board of Managers of the National Home for D. V. S. for the sole use and benefit of the post fund of said Home, and that all my personal property shall upon my death, while a member, at once pass to and vest in said Board of Managers, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after my death."

(12) That the Court has jurisdiction of the parties plaintiff and defendant herein and of the subject matter hereof.

(13) That the statutes of the State of Illinois and United States shall be deemed admitted in evidence.

RAY M. FOREMAN,
ELDON L. MCLAUGHLIN,
Attorneys for plaintiff.
WALTER E. ACKERMANN,
Attorney for defendants.

Endorsed: Assumpsit. * * (Caption—247D) * * Stipulation of Facts. Filed Feb. 8, 1934, Douglas H. Reed, Clerk.

28 And on the same day, to-wit: the 8th day of February, A. D. 1934, there was filed in the office of the Clerk of said Court, a General Issue, which said general issue plea was and now is in words and figures following, to-wit:

29 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—247D) * *

GENERAL ISSUE.

And the Defendants, by Walter E. Ackermann, their Attorney, come and defend the wrong and injury when, etc.; and say that they, nor either of them, did not promise in manner and form as the plaintiff as above thereof complained against them; and of this they put themselves upon the country, etc.

WALTER E. ACKERMANN.

Endorsed: No. 247-D. Harvey M. Wood, Admr. Est. of Walter Searles, deceased vs. The National Home for Disabled Volunteer Soldiers, Danville, Illinois, et al. General Issue. Filed Feb. 8, 1934, Douglas H. Reed, Clerk.

30 And afterwards, on to-wit: the 3rd day of January, A. D. 1935, the following further proceedings were had in said Court in said cause, and entered of record, to-wit:

31 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—247-D) * *

Plaintiff, as Administrator of the Estate of Walter Searles, Deceased, brought this suit to recover pension moneys that had accumulated to his credit in the hands of the treasurer at the Soldiers' Home from payments by the Pension Board prior to his death. The case was tried without a jury upon an agreed statement of facts.

The deceased was an inmate and member of the National Home for Disabled Volunteer Soldiers (now by Act of Congress, Veterans Administration Home of Danville, Illinois, which is bound by the "Contracts and obligations" of the predecessor), and died therein September 16, 1926 while a pensioner. Some $1500.00 had been paid by the Pension Bureau in monthly installments to the treasurer of the home in the way of pensions for the deceased, and this remained on deposit with the treasurer at the time of deceased's death for his credit. Other detailed facts appear in the stipulation.

Title 24, Section 136, U. S. Code (June 25, 1910) is as follows:

"The application of any person for membership in the National Home for Disabled Volunteer Soldiers and the admission of the applicant thereunder shall be and constitute a valid and binding contract between such applicant and the Board of Managers of said home that on the death of said applicant while a member of such home, leaving no heirs at law nor next of kin, all personal property owned by said applicant at the time of his death, including money or
32 choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived, shall vest in and become the property of said Board of Managers for the sole use and benefit of the post fund of said home, * * * subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after the death of such member.

Pursuant to said Section upon admission to the Home, the deceased contracted that all of his personal property should upon his death, should he leave no heirs, at once pass to the Board of Managers, subject to be reclaimed "by any legatee or person entitled to take the same by inheritance."

Moneys such as these, under Section 52, Title 24 U. S. Code enacted August 17, 1912 are not a part of the funds of the Home but held by the treasurer in trust for the pensioner and in case of his death for his legal heirs. Pertinent provisions of that section are as follows:

"The pensions of all inmates of the home, except such as shall be assigned as aforesaid, shall be paid to the treasurer of the home. The money thus derived shall not become a part of the funds of the home, but shall be held by the treasurer in trust for the pensioner to whom it would otherwise have been paid, and such part of it as shall not sooner have been paid to him shall be paid to him on his discharge from the institution. * * * In case of the death of any pensioner, any pension money due him and remaining in the hands of the treasurer shall be paid to his legal heirs, if demand is made within three years; otherwise the same shall escheat to the home."

Section 138 of Title 24 August 17, 1912 of the U. S. Code enacted simultaneously with Section 52, is as follows:

"All pensions and arrears of pensions payable or to be paid to pensioners who are or may become inmates of the National Home for Disabled Volunteer Soldiers shall be paid

to the Treasurers of said home, to be disbursed for the benefit of the pensioners without deduction for fines or penalties, under the rules and regulations of said home. Said payments shall be made by the Bureau of Pensions upon a certificate of the proper officer of the Home that the pensioner is an inmate thereof on the day to which said pension is drawn. The treasurers of said home, respectively, shall give security, to the satisfaction of the managers of said home, for the payment and application by them of all arrears of pension and pension moneys they may receive under the aforesaid
33 provision. Any balance of the pension which may remain at the date of the pensioner's discharge shall be paid over to him."

The next Section, 139, enacted July 1, 1902, is as follows:

"Any balance of pension money due a member of the National Home for Disabled Volunteer Soldiers at the time of his death shall be paid to his widow, minor children or dependent mother or father in the order named, and should no widow, minor child, or dependent parent be discovered within one year from the time of the death of the pensioner, said balance shall be paid to the post fund of the branch of said National Home of which the pensioner was a member at the time of his death, to be used for the common benefit of the members of the home under the direction of the Board of Managers, subject to future reclamation by the relatives designated in this section upon application filed with the Board of Managers within five years after the pensioner's death."

Under this Section, if it controlls, such accumulated funds, in case there is no widow, minor children or dependent parents, must be paid to the post fund of the Home.

It should be observed that there are certain earlier Acts. Thus, Section 2 of the Act of 1881, c. 80, is as follows:

"All pensions payable, or to be paid under this act, to pensioners who are inmates of the National Home for Disabled Volunteer Soldiers shall be paid to the Treasurer or Treasurers of said home, upon security given to the satisfaction of the managers to be disbursed for the benefit of the pensioners without deduction for fines or penalties under regulations to be established by the managers of the home; said payment to be made by the pension agent upon a certificate of the proper officer of the home that the pensioner is an inmate thereof and is still living. Any balance of the pension which may remain at the date of the pensioner's discharge

shall be paid over to him; and in case of his death at the home, the same shall be paid to the widow, or children, or in default of either to his legal representatives."

This Act was expressly continued in force when a similar section, that of Section 1 of the Act of August 7, 1882, c. 433 was enacted. The latter is as follows:

34 "All pensions and arrears of pensions payable or to be paid to pensioners who are or may become inmates of the National Home for Disabled Volunteer Soldiers shall be paid to the Treasurers of said Home, to be applied by such Treasurers as provided by law, under the rules and regulations of said home. Said payments shall be made by the pension agent upon a certificate of the proper officer of the home that the pensioner is an inmate thereof on the day to which said pension is drawn. The treasurers of said home, respectively, shall give security, to the satisfaction of the managers of said home, for the payment and application by them of all arrears of pension and pension-moneys they may receive under the aforesaid provision. And section two of the act entitled 'An act making appropriations for the payment of invalid and other pensions of the United States for the fiscal year ending June thirtieth, eighteen hundred and eighty-two, and for deficiencies, and for other purposes', approved February twenty-sixth, eighteen hundred and eighty-one, is hereby revived and continued in force."

These Sections have never been expressly repealed but are omitted from the United States Code. The annatator of the Code suggests that these provisions were probably superseded by Section 139 of the Code. Sections 52 and 136 are part of an Act of August 17, 1912, c. 301.

The enacting clause of the United States Code provides that the code shall establish prima facie the laws of the United States in force December 17, 1925 but that nothing in the act shall be construed as repealing or amending any such law or as enacting as new law any matter contained in the Code. It is further provided that in case of any inconsistency between the provisions of any section of the code and the corresponding portion of legislation theretofore enacted, effect shall be given for all purposes whatsoever to such prior enactments. Thus it is seen that by the enactment of the code and the exclusion therefrom of certain sections of prior legislation and the inclusion of others it is not intended to repeal any such excluded sections of prior legislation.

From this recital of the provisions of the various sections

it is apparent that, beginning with 1881, Congress has constantly given expression to an intent that pension
35 moneys paid to the treasurer of a Home for disbursement to an inmate of the Home should become and be the property of the inmate, and in case of his death, of his widow and children. Such was the provision of the Act of 1881, continued in full force by the Act of 1882, neither of which has ever been expressly repealed.

In this situation, on July 1, 1902 Section 139 was enacted. This Act did not purport to repeal the previously existing sections but did provide that "any balance of pension money due a member" at the time of his death should be paid "to his widow, minor children or dependent mother or father" and should no such relative be discovered, that the balance such be paid to the "post fund" subject to "reclamation by the relatives designated in this section" provided application be made within five years after pensioner's death. If it be admitted that this section impliedly repealed the provisions of the acts of 1881 and 1882 so that money and other property in the hands of the treasurer could pass only to the relatives designated in Section 139, we have left for determination the effect of the subsequent legislation of 1912. Thus we find that in Section 52, Congress expressly provided that the pensions of all inmates should be paid to the treasurer but should not become a part of the funds of the Home but should be held by the treasurer in trust for the pensioner and that in case of the death of any pensioner, any pension money due him and remaining in the hands of the treasurer should be paid to his legal heirs, if demand should be made within three years. Otherwise, the same would escheat to the Home. Section 136, likewise adopted in 1912, subsequent to the enactment of Section 139 provides that pension money and all moneys and choses in action held by the treasurer for the pensioner, if the latter should die leaving no heirs at
36 law or next of kin, should vest in the Board of Managers "subject to be reclaimed by any legatee or persons entitled to the same by inheritance at any time within five years after the death of such member."

The last expression of the legislative will must prevail and though implied repeals are not favored and must be established by clear and convincing evidence of an intention to repeal, the history of the legislation and the language of the last expression of the Congress demonstrate to the mind of this court beyond cavil that Sections 52 and 136 adopted in

1912 and expressly providing that the money collected by the treasurer for the benefit of the pensioner should be held in trust by the treasurer of the Home and paid to his heirs, legatees or next of kin, must prevail over the earlier act of 1910 seemingly but not clearly indicating a contrary intent.

If we are to give strict effect to the provisions of Section 139 and apply the same to the present case, then the purpose of Section 52 and 136, enacted later, is entirely nullified and Congress in enacting the same did a futile thing. Presumably Congress intended what it said and its language, being inconsistent with the previously existing legislation and plain and unambiguous, it follows that the plaintiff must prevail.

Judgment will enter for the amount of the deposit $1546.47 plus interest thereon at the rate of 5 per cent per annum since October 1, 1926, or $2223.02 and costs of suit.

Dated this 3rd day of January, A. D. 1935.

WALTER C. LINDLEY,
Judge.

Endorsed: At Law No. 247-D Harvey M. Wood, as Admr. Estate of Walter Searles, Dec'd. vs. The National Home for Disabled Volunteer Soldiers, Danville, Illinois, et al., Memo of the Court Filed and entered Jan. 3, 1935, D. H. Reed, Clerk.

37 And afterwards, on to-wit: the 19th day of January, A. D. 1935, there was filed in the office of the Clerk of said Court in said Cause, a Motion to Arrest Judgment, which said motion was and now is in words and figures following, to-wit:

38 IN THE DISTRICT COURT OF THE UNITED STATES.

MOTION TO ARREST JUDGMENT.

Comes now the defendant in the above entitled cause by its attorneys, Paul F. Jones, United States Attorney and Walter E. Ackermann, Assistant United States Attorney and moves the court to arrest judgment in the above cause for the following reasons:

I. That the finding of the court as of January 3, 1935 is contrary to the law which applies to the facts in the instant case.

II. That the finding of the court of January 3, 1935 is contrary to the laws of the United States as defined in Section 139, Title 24.

For the reasons submitted above the defendant respectfully moves the court to arrest judgment.

PAUL F. JONES,
United States Attorney.
By WALTER E. ACKERMANN,
Assistant United States Attorney.

Endorsed: No. 247-D in The District Court of the United States of America for the Eastern District of Illinois—Harvey M. Wood, As Administrator in the Estate of Walter Searles, deceased vs. The National Home for Disabled Volunteer Soldiers, Danville, Illinois, et al., Motion to Arrest Judgment—Filed Jan. 19, 1935—D. H. Reed, Clerk—Paul F. Jones, U. S. Attorney.

39 And on the same day, to-wit: the 19th day of January, A. D. 1935, the following further proceedings were had in said Court in said Cause and entered of record, to-wit:

40 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—247. D) * *

Present: Honorable Walter C. Lindley, Judge.

And now on this 19th day of January, A. D. 1935, come the defendants herein by their attorneys and present to the Court their Motion to Arrest Judgment, which motion is by the court overruled and to which ruling of the court an exception is allowed.

41 And afterwards on to-wit: the 24th day of January, A. D. 1935, there was filed in the office of the Clerk of said Court in said Cause, a Motion for New Trial, which said motion was and now is in words and figures following, to-wit:

42 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—247 D) * *

MOTION FOR NEW TRIAL.

Comes now the defendant, United States of America, in the above entitled cause and moves that the judgment of the court be set aside and it be granted a new trial in said cause for the following reasons:

I. That the judgment of the court is contrary to the law.

II. That the court has no jurisdiction over the subject matter and parties to this cause.

Wherefore, the defendant moves the court, for the reasons given above, to grant it a new trial.

PAUL F. JONES,
United States Attorney.
By WALTER ACKERMANN,
Assistant United States Attorney.

Endorsed: No. 247-D In the District Court of the Untied States of America for the Eastern District of Illinois—Harvey M. Wood, as Administrator in the Estate of Walter Searles, deceased, vs. The National Home for Disabled Volunteer Soldiers, Danville, Illinois, et al. Motion for New Trial—Filed Jan. 24, 1935—D. H. Reed, Clerk—Paul F. Jones, U. S. Attorney.

43 And on the same day, to-wit: the 24th day of January, A. D. 1935, the following further proceedings were had in said Court in said Cause and entered of record, to-wit:

44 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—247 D) * *

Present: Honorable Walter C. Lindley, Judge.

And now on this 24th day of January, A. D. 1935, come the defendants herein by their attorneys and present to the court their Motion for a New Trial, which motion is by the court overruled and to which ruling of the court an exception is allowed.

45 And afterwards, on to-wit: the 26th day of January, A. D. 1935, the following further proceedings were had in said Court in said Cause and entered of record, to-wit:

46 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—247 D) * *

ORDER OF JUDGMENT.

Final judgment is hereby rendered in favor of the plaintiff and against the defendants, the National Home for Disabled Volunteer Soldiers, a corporation, and the Veterans Administration, in the sum of Two Thousand One Hundred Eighty-four and 63/100 Dollars ($2184.63) and costs of suit.

Dated this 26th day of January, A. D. 1935.

WALTER C. LINDLEY,
Judge.

Endorsed: * * (Caption 247 D) * * Order of Judgment—Filed and entered January 26, 1935, D. H. Reed, Clerk.

56 And afterwards, on to-wit: the 4th day of February, A. D. 1935, there was filed in the office of the Clerk of said Court, in said cause, a Notice of Appeal, which said notice of appeal was and now is in words and figures following, to-wit:

57 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—247 D) * *

NOTICE OF APPEAL.

To Ray M. Foreman, Attorney for Plaintiff:

You are hereby notified that on February 2, 1935, or as soon thereafter as we can obtain a hearing before the court, we shall appear before the Honorable Walter C. Lindley at Danville, Illinois and shall present a petition for appeal in the United States Circuit Court of Appeals for the Seventh Circuit in behalf of the United States of America at which time and place you may appear if you see fit.

UNITED STATES OF AMERICA,
By PAUL F. JONES,
United States Attorney.

Received a copy of the foregoing notice on the 2 day of February, A. D. 1935.

RAY M. FOREMAN,
Attorney for Plaintiff.

Endorsed: * * (Caption—247 D) * * Notice of Appeal Filed Feb. 4, 1935—D. H. Reed, Clerk—Paul F. Jones, U. S. Attorney.

47 And afterwards, on to-wit: the 2nd day of February, A. D. 1935, there was filed in the office of the Clerk of said Court in said Cause, a Petition for Appeal, which said petition for appeal, was and now is in words and figures following, to-wit:

48 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—247 D) * *

PETITION FOR APPEAL.

Now comes the United States of America, defendant herein by Paul F. Jones, United States Attorney in and for the Eastern District of Illinois and respectfully appeals from the judgment entered by this court on January 26, 1935.

Wherefore, said defendant, United States of America prays that this Honorable Court enter an order granting an appeal from said judgment.

UNITED STATES OF AMERICA
By PAUL F. JONES,
United States Attorney.

Endorsed: * * (Caption—247 D) * * Filed Feb. 2, 1935 D. H. Reed, Clerk—Petition for Appeal—Paul F. Jones, U. S. Attorney.

51 And on the same day, to-wit: the 2nd day of February, A. D. 1935, there was filed in the office of the Clerk of said Court in said cause, Assignment of Errors, which said assignment of errors was and now is in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—247 D) * *

ASSIGNMENTS OF ERROR.

Comes now the defendant, United States of America in the above entitled cause and files the following assignments of error upon which it will rely in the prosecution of the appeal herewith petitioned for from the judgment of the court entered on the 26th day of January, A. D. 1935.

1. That the judgment of the court is contrary to the law.
2. That the court has no jurisdiction over the subject matter and parties to this cause.

Wherefore, the defendant prays that the said judgment may be reversed and such other and further relief as to the court may seem just and proper.

UNITED STATES OF AMERICA,
By PAUL F. JONES,
United States Attorney.

Endorsed: In the District Court of the United States * * (Caption—247 D) * * Assignments of Errors Filed Feb. 2-1935. D. H. Reed, Clerk. Paul F. Jones, U. S. Attorney.

And afterwards, on to-wit: the 16th day of February, A. D. 1935, there was filed in the office of the Clerk of said Court in said cause, a Motion to Amend Assignment of Errors, which said motion was and now is in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—247 D) * *

MOTION TO AMEND ASSIGNMENTS OF ERROR.

Comes now the defendant, United States of America in the above entitled cause and moves that it be permitted to amend the assignments of error which have been filed by adding the following:

3. That the court erred in allowing interest at the rate of

five percent per annum on the original amount $1546.47 which is contrary to the law, Section 284, Title 28, U. S. C. A.

UNITED STATES OF AMERICA,
By ARTHUR ROE,
United States Attorney.

Allowed.

LINDLEY,
Judge.

Endorsed: No. 247-D in the District Court of the United States of America for the Eastern District of Illinois—Harvey M. Wood, As Administrator of the Estate of Walter Searles, deceased, vs. The National Home for Disabled Volunteer Soldiers, Danville, Illinois, et al., Motion to Amend Assignment of Errors—Filed Feb. 16, 1935—H. D. Reed, Clerk —Arthur Roe, U. S. Attorney.

60 And on the same day, to-wit: the 16th day of February, A. D. 1935, the following further proceedings were had in said Court in said Cause, and entered of record, to-wit:

60½ IN THE DISTRICT COURT OF THE UNITED STATES.

For the Eastern District of Illinois.

Saturday, February 16th, A. D. 1935.

Present: Honorable Walter C. Lindley, Judge.

Harvey M. Wood, as Administrator of the Estate of Walter Searles, deceased
vs.
The National Home for Disabled Volunteer Soldiers, Danville, Illinois, *et al.*
} No. 247-D

And now on this 16th day of February, A. D. 1935, comes the defendant, United States of America, by its Attorney Arthur Roe, and presents to the court its motion for permission to amend the assignment of error filed herein on February 2nd, 1935, by adding another paragraph thereto,—which motion is by the court allowed.

49 And on the same day, to-wit: the 2nd day of February, A. D. 1935, the following proceedings were had in said Court in said cause, and entered of record, to-wit:

50 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—247 D) * *

ORDER ALLOWING APPEAL.

This day came the defendant, United States of America, defendant in the above cause, and files its petition for an appeal from the judgment heretofore entered by this court in this cause on January 26, 1935; and it appearing that the said defendant, United States of America has given due and proper notice of the filing of said petition for the allowance of an appeal;

It Is Hereby Ordered that an appeal be, and the same is hereby granted and allowed the defendant, United States of America from the judgment of this court in this cause on January 26, 1935; and that the Term of Court be extended until May 3, 1935 to file bill of exceptions and transcript of record in the Circuit Court of Appeals for the Seventh Circuit.

Entered this 2nd day of February, A. D. 1935.

WALTER C. LINDLEY,
U. S. District Judge.

Endorsed: In the District Court of the United States. * * (Caption—247 D) * * Order Allowing Appeal. Filed Feb. 2, 1935. D. H. Reed, Clerk.

53 And on the same day, to-wit: the 2nd day of February, A. D. 1935, there was filed in the office of said Clerk of said court in said cause, a Praecipe for Record, which said praecipe for record was and now is in words and figures following, to-wit:

54 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—247 D) * *

PRAECIPE FOR RECORD.

To the Clerk of the District Court of the United States for the Eastern District of Illinois:

You will please prepare the transcript of the record in the above entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, under the order of appeal heretofore allowed by said court, said record to include the following:

1. Affidavit of service, showing filing thereof.
2. Declaration of plaintiff and any amended declaration, showing filing thereof.
3. All pleas filed by the defendant, showing filing thereof.
4. All orders entered by the court in said cause.
5. Written judgment, showing filing thereof.
6. Notice of filing and presentment of petition for appeal with endorsement of counsel for plaintiff.
7. Order of appeal, showing filing thereof.
9. Petition for appeal, showing filing thereof.

55 10. Assignment of errors, showing filing thereof.

11. Citation for appeal, showing filing thereof.
12. Praecipe for record, showing filing thereof.
13. And all other pertinent records which are a part of this cause.

All of which is respectfully prayed for and requested.

UNITED STATES OF AMERICA,
By PAUL F. JONES,
United States Attorney.

Endorsed: Law No. 247-D. In the District Court of the United States of America for the Eastern District of Illinois. Harvey M. Wood, as Administrator of the Estate of Walter Searles, deceased, vs. The National Home for Disabled Volunteer Soldiers, Danville, Illinois, et al. Praecipe for Record. Filed Feb. 2, 1935. D. H. Reed, Clerk. Paul F. Jones, U. S. Attorney.

62 United States of America, } ss:
Eastern District of Illinois. }

I, D. H. Reed, Clerk of the United States District Court in and for the Eastern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original correct, full and complete transcript of the record and proceedings, in a cause entitled Harvey M. Wood, as Administrator of the Estate of Walter Searles, deceased vs. The National Home for Disabled Volunteer Soldiers, Danville, Illinois, et al., in Law No. 247-D, as fully as the same appears from the originals now on file and of record in my office as Clerk of said Court, and made in accordance with Appellant's Praecipe for Record, filed in said Cause.

And I further certify that the Citation with Return of Service Thereon, is the original Citation and Return of Service, filed and entered in said cause.
now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Danville this 22nd day of February, A. D. 1935.

D. H. Reed,
Clerk.

By Marie Burnett,
Deputy Clerk.

61 United States of America } ss:

The President of the United States to Harvey M. Wood as Administrator in the Estate of Walter Searles, Deceased, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to ..... filed in the Clerk's Office of the District Court of the United States for the Eastern District of Illinois, wherein The National Home for Disabled Volunteer Soldiers, Danville, Ill., the Veterans Administration, Home, Ralph W. Jones, as Accountant of said Home, Walter T. Christy as Special Disbursing Agent of said Home, and Ralph W. Jones, Treasurer of National Home for Disabled Volunteer Soldiers is appellant and you are Appellee to show cause, if any there be, why the Judgment rendered against the said Appellant as in the said Judgment mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Walter C. Lindley, Judge of the District Court of the United States, for the Eastern District of Illinois, this 2nd day of February, in the year of our Lord one thousand nine hundred and thirty-five.

WALTER C. LINDLEY,
Judge.

Service of Copy of the foregoing Citation is hereby acknowledge this 4th day of February, A. D. 1935.

RAY M. TRUMAN,
E. L. MCLAUGHLIN,
Attorneys for Appellee.

(Endorsed): District Court United States * * (Caption —247 D) * * Citation Returnable 22nd day of February, 1935. D. H. Reed, Clerk. Filed Feb. 4, 1935. D. H. Reed, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 33, inclusive, contain a true copy of the printed record, printed under my supervision, and filed on the eighth day of May, 1935, upon which the following cause was heard and determined:

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, DANVILLE, ILLINOIS, THE VETERANS' ADMINISTRATION HOME, ET AL., APPELLANTS

vs.

HARVEY M. WOOD, AS ADMINISTRATOR OF THE ESTATE OF WALTER SEARLES, DECEASED, APPELLEE

No. 5477, October Term, 1935, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 28th day of April, A. D. 1936.

[SEAL] FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States court room in the City of Chicago, in said Seventh Circuit on the second day of October, 1934, of the October Term in the year of our Lord One Thousand Nine Hundred and Thirty-Four and of our Independence the One Hundred and Fifty-Ninth.

5477

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, DANVILLE, ILLINOIS, THE VETERANS' ADMINISTRATION HOME, ET AL.

vs.

HARVEY M. WOOD, AS ADMINISTRATOR OF THE ESTATE OF WALTER SEARLES, DECEASED

Appeal from the District Court of the United States for the Eastern District of Illinois

And on, to-wit: On the fourteenth day of June, 1935, there was filed in the office of the clerk of this court a motion to dismiss, which said motion is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, DANVILLE, LLLINOIS, THE VETERANS' ADMINISTRATION, ET AL., APPELLANTS

vs.

HARVEY M. WOOD, AS ADMINISTRATOR OF THE ESTATE OF WALTER SEARLES, DECEASED, APPELLEE

On Appeal from the District Court of the United States for the Eastern District of Illinois

Motion to dismiss

Now comes Harvey M. Wood, as Administrator of the Estate of Walter Searles, deceased, the appellee herein, by Ray M. Foreman, Lawrence T. Allen, and Everett L. Dalbey, his attorneys, and files this his motion to dismiss the appeal of the cause herein and as reasons therefor, states:

(1) The National Home for Disabled Volunteer Soldiers, a Corporation, The Veterans' Administration, Ralph W. Jones, as accountant of said Veterans' Administration, Walter C. Christy, as Special disbursing agent of said Veterans' Administration, and Ralph W. Jones, as Treasurer of the National Home for Disabled Volunteer Soldiers, a Corporation, defendants herein, have each and all of them failed to file and have approved their bond for appeal in the cause herein, as provided by the laws of the United States and the rules of this court.

(2) That Rule 12 of the rules of the Circuit Court of Appeals for the Seventh Circuit provide that cost bonds in the District Court covering appeals taken to the Circuit Court of Appeals must be taken with good and sufficient sureties that the appellant will definitely prosecute his appeal to effect and answer all damages and costs if he fails to make his plea good, and the appellants herein, being the defendants in the District Court, have failed to file said bond.

HARVEY M. WOOD,
as Adm., Appellee.
By LAWRENCE T. ALLEN,
EVERETT L. DALBEY,
RAY M. FOREMAN,
Attorneys for Appellee.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States court room in the City of Chicago, in said Seventh Circuit on the first day of October, 1935, of the October Term in the year of our Lord One

Thousand Nine Hundred and Thirty-Five and of our Independence the One Hundred and Sixtieth.

And afterwards, to-wit: On the thirtieth day of October, 1935, the following further proceedings were had and entered of record, to-wit:

Wednesday, October 30, 1935

Court met pursuant to adjournment

Before Hon. EVAN A. EVANS, Circuit Judge; Hon. SAMUEL ALSCHULER, Circuit Judge; Hon. ROBERT C. BALTZELL, District Judge

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NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, ET AL.

vs.

HARVEY M. WOOD, AS ADMINISTRATOR, ETC.

Appeal from the District Court of the United States for the Eastern District of Illinois

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Joseph A. Troy, Jr., and Mr. John M. George, counsel for appellants, and by Mr. Ray M. Foreman, counsel for appellee, and the court having heard the same takes this matter under advisement.

Leave is hereby granted appellee to file supplemental brief within 5 days.

And afterwards, to-wit: On the nineteenth day of *February, 1936*, there was filed in the office of the clerk of this court the opinion of the court, which said opinion is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit

October Term, 1935, January Session, 1936

No. 5477

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, DANVILLE, ILLINOIS, THE VETERANS' ADMINISTRATION HOME, ET AL., APPELLANTS

vs.

HARVEY M. WOOD, AS ADMINISTRATOR OF THE ESTATE OF WALTER SEARLES, DECEASED, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Illinois

February 19, 1936

Before EVANS and ALSCHULER, Circuit Judges, and BALTZELL, District Judge

ALSCHULER, Circuit Judge. The facts all appear by stipulation. Walter Searles, a veteran Union soldier of the Civil War, died intestate September 16, 1926, while an inmate of the Danville Branch of the National Home for Disabled Volunteer Soldiers, a corporation which by act of Congress became the Veterans' Administration Home of Danville, Illinois, bound by the obligations of its predecessor. He left no property save the hereinafter mentioned pension money. Surviving him is an only child, Herbert A., then about forty-five years old. Deceased left no widow or parent.

Deceased had long been receiving a soldier's pension, which, while he was an inmate of the home, was periodically paid to its treasurer for disbursement under applicable statutes and regulations. Upon his death, and after certain uncontested disbursements, there remained in the hands of the treasurer of the home a balance of such pension money of $1,546.47, to recover which the suit was brought by the administrator of the deceased for the benefit of Herbert. The court found for appellee and rendered judgment for the amount of the pension money, including interest thereon at five per cent. from date of death, and for costs.

The primary question is, to whom pension moneys in the hands of the treasurer of the home are payable on the death of the veteran while an inmate of the home.

Appellant contends that the applicable statute is 32 Stat. 564,[1] which was enacted July 1, 1902, and that under this section only a widow, minor child or dependent parent may take the balance of the pension money in the treasurer's hands; that Herbert was not one of the designated relatives who might claim, and that no action on his behalf would lie.

Appellee contends that the statute which governs is 36 Stat. 736,[2] adopted June 2, 1910, which provides that reclamation of personal property, which under that act passed to the home, might be made within five years after the death by a legatee or by persons who may take by inheritance.

The 1902 act had reference only to pension money, and did not apply to any other personal property of the soldier. It specified that these moneys shall become the property of the home if not claimed within five years from the death by one of the specified relatives. The 1910 act is far more comprehensive in its provisions. It deals with personal property of every kind of which the deceased inmate died possessed, specifically including "proceeds of pensions." It undertakes to prevent escheat to the state of all personal property left by the deceased, where he leaves no heirs at law or legatees who may take. But it does not stop with providing against escheat to the state: it goes further by definitely specifying that upon the death of all of his personal estate, including proceeds of pensions, shall go to the corporation, subject to reclamation within five years by legatees and persons who may take by inheritance. In this respect, as to pension money it enlarged the provisions of the prior act by specifying the permissible reclaimants as "any legatee or person entitled to take the same by inheritance"; whereas under the first act the pension money would pass to the corporation only in case the deceased soldier left no widow, minor child or dependent parent.

It seems to us that if this part of the 1910 statute does not intend to enlarge the class of persons who may reclaim pension money over the limitations thereon as imposed by the previous act, that part of

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[1] "Hereafter any balance of pension money due a member of the National Home for Disabled Volunteer Soldiers at the time of his death shall be paid to his widow, minor children or dependent mother or father in the order named, and should no widow, minor child, or dependent parent be discovered within one year from the time of the death of the pensioner, said balance shall be paid to the post fund of the Branch of said National Home of which the pensioner was a member at the time of his death, to be used for the common benefit of the members of the Home under the direction of the Board of Managers, subject to future reclamation by the relatives hereinbefore designated, upon application filed with the Board of Managers within five years after the pensioner's death."

[2] "Hereafter the application of any person for membership in the National Home for Disabled Volunteer Soldiers and the admission of the applicant thereunder shall be and constitute a valid and binding contract between such applicant and the Board of Managers of said home that on the death of said applicant while a member of such home, leaving no heirs at law nor next of kin, all personal property owned by said applicant at the time of his death, including money or choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived, shall vest in and become the property of said Board of Managers for the sole use and benefit of the post fund of said home, the proceeds to be disposed of and distributed among the several branches as may be ordered by said Board of Managers, and that all personal property of said applicant shall, upon his death, while a member, at once pass to and vest in said Board of Managers, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after the death of such member. The Board of Managers is directed to so change the form of application for membership as to give reasonable notice of this provision to each applicant and as to contain the consent of the applicant to accept membership upon the conditions herein provided."

the later act, when applied to pension money which it specifically includes, would have no force or effect whatever.

Our attention has been directed to the Congressional Record, Vol. 47, Part 7, pp. 7011, 7012, 7101, as indicating the intended scope of the act of 1910. True it is that the proponents of that measure did explain that it was intended to leave the soldier free to dispose of his personal property, including pension money, as he saw fit, and was directed to preventing escheat to the state in case of his death intestate without legatees or persons who may inherit from him. But, as has been shown, the act does provide that while the personal property, including pension money, passes to the Board of Managers of the home, reclamation may be made by those entitled to take by inheritance or by will without any restrictions upon members of that class; whereas the prior act limited those who might claim the pension money to widow, minor child and dependent parent. This change has no bearing on the matter of escheat to the state.

The Congressional Record does not indicate that any question was raised or discussed with respect to those who might reclaim pension money—whether those as generally specified in the proposed act, or the more limited class as provided in the earlier act. Neither does it appear that any distinction was suggested between the reclaiming of proceeds of pensions and of other personal property of the deceased. Considerable was said concerning the right of the soldier to dispose of his property as he saw fit, and assurance was given that no limitation upon this right was intended. In our judgment the discussion, far from indicating that the proposed act would hark back to previous legislation whereunder only certain of the heirs at law might claim it, indicated an intent that the soldier should have full right to dispose of his personal property, including pension money, by giving right of reclamation from the home to which it would pass under the terms of the proposed act, to the soldier's legatees or those entitled to take from him by inheritance, without continuance of the greater restriction of the prior act as to those who might thereunder reclaim pension money. This provision evidently met with the concurrence of those members who were apparently favorable to the soldier's fullest control of his property, including pension money, and probably for this reason it evoked no discussion. The right of reclamation thus fixed as to all his personal property, including pensions, in our judgment necessarily supplants the prior act so far as its class of claimants is more restricted. We conclude that the act of 1910 is here controlling, and that under it Herbert, the only child of his intestate father, although not a minor is entitled to reclaim this pension money.

We reach this conclusion with that reluctance and hesitation which of necessity is induced by the contrary view of the Circuit Court of Appeals for the First Circuit, as announced in Durack v. National Home for Disabled Volunteer Soldiers, 44 F. (2d) 516.

Under appellants' assignment of error "That the court has no jurisdiction over the subject matter and parties to this cause", they urge that the District Court had no jurisdiction to entertain the cause as against appellants. The reasoning is that the said Act of Congress of July 3, 1930, provides for the transfer of jurisdiction over property of those homes from the corporation to the Veterans' Administration, and authorizes suits for claims to be brought against the United States, and that therefore the action should have been brought against the United States and not against appellants. No such question was raised by the pleadings, and the stipulation of facts into which the parties entered specifies:

"(12) That the Court has jurisdiction of the parties plaintiff and defendant herein and of the subject matter hereof."

In the same brief appellants, in support of their contention that interest and costs were improperly allowed to appellee, said:

"This suit is in fact a suit against the United States. United States vs. Golden, 34 Fed. (2d) 376.

"In actions where any agency of the Government is a party, the court looks through the nominal party and treats the case as one in fact against the Government. State Highway Commission of Wyoming vs. Utah Const. Co., 278 U. S. 194, 49 S. Ct. 104, 73 L. Ed. 262; Schroeder v. Davis, 32 F. (2d) 455 (8 C. C. A.); Kansas v. United States, 204 U. S. 331, 27 S. Ct. 388, 51 L. Ed. 510; U. S. v. Golden, supra."

Accepting this view, we regard the action, though nominally against an agency of the United States, as in fact against the United States. The defense was undertaken and conducted solely by the United States Attorney and his official assistant, without in any way challenging the propriety of the action as brought, but, on the contrary, distinctly stipulating the jurisdiction of the court over parties and subject matter.

Appellants' insistence of error in the allowance of interest is not well grounded. The stipulation recites that shortly after the soldier's death demand was made, by or in behalf of Herbert on the Board of Managers of the home, for payment of the balance of this pension money. Holding as we do that he was entitled to reclaim it, the demand fixed his status as a reclaimant as of that time. It should then have been paid, and failing then to pay it the Board would have been liable for interest for the time payment was withheld.

Section 5 of said Act of July 3, 1930 (38 U. S. C. Sec. 11d (b)), permits allowance of interest against the United States where interest would have been allowable against the corporation before the passage of the act; and we find no error in this allowance of interest.

As to the costs, we are of opinion they should not have been adjudged against appellants, and this item should be eliminated from the judgment.

Except as to the item of costs, the judgment of the District Court is affirmed, and the District Court is directed to eliminate from the judgment the award of costs against appellants.

And on the same day, to-wit: On the nineteenth day of February 1936, the following further proceedings were had and entered of record, to-wit:

Wednesday, February 19, 1936

Court met pursuant to adjournment

Before Hon. Evan A. Evans, Circuit Judge; Hon. Samuel Alschuler, Circuit Judge; Hon. Robert C. Baltzell, District Judge.

5477

The National Home for Disabled Volunteer Soldiers, Danville, Illinois, the Veterans' Administration Home, Ralph W. Jones, as Accountant of Said Home, Walter T. Christy as Special Disbursing Agent of Said Home, and Ralph W. Jones, Treasurer of National Home for Disabled Volunteer Soldiers

vs.

Harvey M. Wood, as Administrator of the Estate of Walter Searles, Deceased

Appeal From the District Court of the United States for the Eastern District of Illinois

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this court that except as to the item of costs, the judgment of the said District Court in this cause be, and the same is hereby affirmed, with interest from the date of the judgment of the said District Court until paid, at the same rate that similar judgments bear in the courts of the State of Illinois; and that this cause be, and the same is hereby remanded to the said District Court with direction to eliminate from the judgment the award of costs against appellants.

United States Circuit Court of Appeals for the Seventh Circuit

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 11, inclusive, contain a true copy of the Motion to Dismiss, filed June 14,

1935; Hearing, entered October 30, 1935; Opinion, filed February 19, 1936, and Judgment entered February 19, 1936, in the case of

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, DANVILLE, ILLINOIS, THE VETERANS' ADMINISTRATION HOME, ET AL., APPELLANTS

vs.

HARVEY M. WOOD, AS ADMINISTRATOR OF THE ESTATE OF WALTER SEARLES, DECEASED, APPELLEE

No. 5477, October Term, 1935, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 28th day of April, A. D. 1936.

[SEAL] FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1936

Supreme Court of the United States

Order allowing certiorari

Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM 1935

No. —

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, DANVILLE, ILLINOIS, AND THE VETERANS' ADMINISTRATION, PETITIONERS

v.

HARVEY M. WOOD, AS ADMINISTRATOR OF THE ESTATE OF WALTER SEARLES, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the petitioners, the National Home for Disabled Volunteer Soldiers, Danville, Illinois, and the Veterans' Administration, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in the above case on February 19, 1936 (R. 42), affirming, except for one item, the judgment of the United States District Court for the Eastern District of Illinois.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Illinois (R. 18–23) is

not officially reported. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 38) is reported in 81 F. (2d) 963.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered February 19, 1936 (R. 42). The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an accumulated pension fund, credited to an inmate of the National Home for Disabled Volunteer Soldiers and standing in the Treasury in the name of the treasurer of such home, becomes payable to the post fund of such home at the death of the inmate, who left surviving him no widow, minor children, dependent mother or father, or whether such fund is a part of the estate of the inmate which may upon his death be recovered by his administrator.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra*, pp. 13–17.

STATEMENT

On February 26, 1932, a suit was instituted both against the National Home for Disabled Volunteer Soldiers, Danville, Illinois, petitioner herein, the Veterans' Administration Home, Danville, Illinois,

Ralph W. Jones, as accountant of the Veterans' Administration Home, Danville, Illinois, and as Treasurer of the National Home for Disabled Volunteer Soldiers, Danville, Illinois, and Walter T. Christy, as Special Disbursing Agent of said Veterans' Administration Home, Danville, Illinois, Respondent, who was plaintiff therein, is administrator of the estate of Walter Searles, deceased, a pensioner (R. 12). The facts, which were stipulated, may be summarized as follows:

Walter Searles, the decedent, was duly enrolled as a member of the National Home for Disabled Volunteer Soldiers at Danville, Illinois, on October 19, 1924. Thereafter, until his death on September 16, 1926, certain amounts granted and allowed him under the pension laws of the United States were paid in installments of $72.00 per month to the Treasurer of the Danville branch of the National Home for Volunteer Soldiers. (R. 13–14.) At the time of his death there was on deposit to his credit with the Danville branch approximately $1,800, and at the time of the filing of the suit there remained, after certain deductions concerning which there was no question, the sum of $1,546.47 (R. 14). Walter Searles died intestate, leaving as his only heir at law a son, Herbert A. Searles, who was not a minor (R. 15).

Within one year following the death of Walter Searles, Herbert A. Searles, his legal heir, made demand upon the National Home for Disabled Volunteer Soldiers for the payment of the pension

fund (R. 16). Thereafter, on March 23, 1931, demand was made upon the Veterans' Administration by the respondent and by Herbert A. Searles for the allowance of the sum of money remaining in the hands of the Veterans' Administration or its proper officials as accrued pension money due Walter Searles (R. 15). On March 25, 1931, the Veterans' Administration refused to accede to this demand (R. 16).

On January 26, 1935, the District Court entered judgment against the petitioners, the National Home for Disabled Volunteer Soldiers, Danville, Illinois, and the Veterans' Administration,[1] in the sum of $2,184.63, which represented the sum on deposit with the treasurer of the home plus interest, and costs of the suit. Judgment was not entered against the Veterans' Administration Home, Danville, Illinois, or against Ralph W. Jones or Walter T. Christy. (R. 26.) On appeal this judgment was modified by refusing to allow respondent costs, and, as modified, affirmed (R. 42).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that on the death of an inmate of a National Home for Disabled Volunteer Soldiers without leaving a wife, minor children,

[1] The Veterans' Administration had not been joined as a defendant. See *infra*, pp. 8–9.

father or mother surviving him, accrued pension money in the hands of the treasurer of the home passed to the inmate's administrator, and not to the post fund of the home.

2. In holding that the Act of June 25, 1910, and not the Act of July 1, 1902, controlled the disposition of such fund.

3. In affirming the judgment of the District Court.

REASON FOR GRANTING THE WRIT

The Act of July 1, 1902, (c. 1351, 32 Stat. 564; U. S. C., Title 24, Sec. 139) *infra,* p. 15, provided that the balance of any pension money due a member of the National Home for Disabled Volunteer Soldiers at the time of his death "shall be paid to his widow, minor children or dependent mother or father in the order named," and that should none of the individuals therein named be discovered within one year from the time of the death of the pensioner, the balance should be paid to the post fund of the branch of the National Home of which the pensioner was a member at the time of his death. Admittedly, the decedent had no relatives within the above classification, and, if the statute be still in force, it precludes the payment of any pension money to the respondent in the instant case. The court below, however, held that the Act of July 1, 1902, was modified by the Act of June 25, 1910, (c. 384, 36 Stat. 703; U. S. C., Title 24, Sec. 136) *infra*, pp. 15–16, to allow an heir at law

or next of kin to recover unpaid pension moneys provided that application for the payment of such moneys was made within five years after the death of the member.

This decision is in direct conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Durack* v. *National Home for Disabled Volunteer Soldiers,* 44 F. (2d) 516. The court there held, in circumstances identical with those in the instant case, that the Act of 1902 and not the Act of 1910 was controlling. This conflict was specifically noted by the court below, which stated (R. 40): "We reach this conclusion with that reluctance and hesitation which of necessity is induced by the contrary view of the Circuit Court of Appeals for the First Circuit, as announced in *Durack* v. *National Home for Disabled Volunteer Soldiers,* 44 F. (2d) 516."

Furthermore, it is submitted that the decision below is erroneous. The Act of 1902 provided specifically that accrued pension funds over which the United States had plenary control, should pass only to a limited class of relatives. The Act of 1910 was a general statute regulating the disposition of *all property* of the pensioner which might have come into the hands of the treasurer or other officers of the Home. Repeals by implication are not favored (*North American Commercial Co.* v. *United States,* 171 U. S. 110, 130; *United States* v. *Greathouse,* 166 U. S. 601, 605) and particularly should not be here when an implied repeal will

make the statute inconsistent with other provisions of the statutes dealing with the distribution of pension money. Sections 53, 96, U. S. C., Title 38. Moreover, the present decision is contrary to long continued administrative interpretation. 4 Comp. Gen. 752 (1925); XIX Comp. Treas. 388 (1913).

Finally, the question involved is one of appreciable administrative importance. There are now pending many similar suits, and, unless an authoritative decision is made by this Court, many other actions will doubtless be brought.

The form of the proceedings in the present case is somewhat peculiar and requires comment. By the Act of July 3, 1930 (c. 863, 46 Stat. 1016; U. S. C., Title 38, Sec. 11d), *infra*, pp. 16–17, Congress provided that the corporation known as the National Home for Disabled Volunteer Soldiers should be consolidated with the United States Veterans Bureau and the Bureau of Pensions into the Veterans' Administration, and that when the consolidation was proclaimed by the President the corporation should cease to exist. Under date of June 21, 1930, the President issued this proclamation (Executive Order No. 5398), and from that date the corporation has had no existence, and all its assets have been in the possession of the Federal Government.

By Section 5 (b) of the Act of July 3, 1930, however, the United States assumed all the valid

and subsisting obligations of the defunct corporation, and provided that the obligations might be enforced—

> by suit in the Court of Claims or in the district courts of the United States according to the ordinary provisions of law governing actions against the United States, and such courts shall have the power to enter judgment against the United States, with interest, in the same manner and to the same extent as if said corporation were party defendant.

When respondent filed his declaration on February 26, 1932 (R. 5), he did not name the United States as defendant, as he should have done had he followed the literal requirements of the Act. However, he did advert to the fact that the corporation was—

> dissolved and all its duties, obligations, rights, powers, etc., transferred to the Veterans Administration of the City of Washington, District of Columbia, as a part of the Government of the United States (R. 5).

This may be taken as an indirect and inartistic way of making the United States, through the Veterans' Administrafion, a party defendant, even though not named in the caption. It seems to have been so construed by the trial judge, who directed that the judgment run against the defunct corporation and the Veterans' Administration (R. 26) which he apparently considered to be the Government as represented by that branch most directly

concerned with the administration of veterans' affairs. Moreover, it seems to have been so interpreted by the United States Attorney, who thereafter proceeded in the name of the United States of America (R. 26, 27, 28, 29, 31).

However, even if the United States was not thus made a party, nevertheless the District Court and this Court have jurisdiction of the present case. The action is, according to the caption, against the defunct corporation, the Veterans' Administration Home, which is merely a group of buildings having no independent legal status, and two persons holding positions under the United States, in their official capacities. Actually, however, the suit has been defended throughout by the United States Attorney. It has been treated as one in which the United States was the real party defendant; indeed, in the motion for a new trial (R. 25), and in all subsequent proceedings, action has been taken in the name of the United States of America (See R. 26, 27, 28, 29, 31). Any judgment entered in favor of respondent would of necessity be a judgment against the United States, which now has possession of all the assets of the defunct corporation, including those claimed in the present case (Act of July 3, 1930, c. 863, 46 Stat. 1016; U. S. C., Title 38, Sec. 11d), for the individuals were not sued in their individual capacity, and no judgment was entered against them in either capacity (R. 26). As the court below pointed out in its opinion (R. 41),

petitioners urged in opposition to the allowance of interest and costs that the suit was in fact one against the United States, and on this basis succeeded in having costs eliminated from the judgment of the District Court (R. 42). In such circumstances it is submitted that the court below was correct in holding that the suit, although formally against others, was in fact against the United States. Cf. *Minnesota* v. *Hitchcock,* 185 U. S. 373; *State Highway Commission of Wyoming* v. *Utah Construction Co.,* 278 U. S. 194; *United States* v. *Golden,* 34 F. (2d) 367, 376 (C. C. A. 10th); *Schroeder* v. *Davis,* 32 F. (2d) 454 (C. C. A. 8th).

A similar situation was presented in *Minnesota* v. *Hitchcock,* 185 U. S. 373. An original suit was there brought in this Court by the State of Minnesota against the Secretary of the Interior and the Commissioner of the General Land Office, to enjoin them from selling certain lands. The Court found that it had jurisdiction, basing its conclusion upon the fact that the United States, although not named as a party, was in fact the real defendant in the action, and that the Constitution extends the judicial power of the United States to controversies "to which the United States shall be a party." The Court, in other words, treated the case as one against the United States, even though it was not named as defend-

ant.[2] Cf. *United States Fidelity & Guaranty Co.* v. *Kenyon,* 204 U. S. 349, and cases cited. The same rule has been applied in cases in which the jurisdiction of the Federal court rests upon diversity of citizenship. Jurisdiction there depends upon whether the citizenship of the real parties in interest is diverse, and formal parties of record will be ignored, both to sustain jurisdiction (*Wormley* v. *Wormley,* 8 Wheat. 421; *Browne* v. *Strode,* 5 Cranch 303) and to deny it (*Mitchell* v. *Maurer,* 293 U. S. 237, 242).

Applying the principle of these cases to the present action, the jurisdiction of the lower courts and of this Court rests upon the fact that it is actually one against the United States. Jurisdiction over such suits has been expressly vested in the district courts by the Act of July 3, 1930, *infra,* pp. 16–17, and by the Tucker Act (Act

[2] The force of this analogy is not weakened by the opinion in *Williams* v. *United States*, 289 U. S. 553, 568, 572, which stated that *Minnesota* v. *Hitchcock* was erroneous in holding that the judicial power granted under Article III extended to suits to which the United States was a defendant, even if it had consented. There is no intimation in the *Williams* case that it disapproved of the fact that the United States was treated as the actual defendant even though not named as a party. Nor does the statement in the *Williams* case deprive this Court of appellate jurisdiction to review decisions of lower courts entered against the United States without its consent, for they exercise a judicial power, even though it is not derived from Article III of the Constitution. See 289 U. S. at 579–581.

of March 3, 1887, c. 359, 24 Stat. 505; U. S. C., Title 28, Sec. 41, par. 20). Whatever formal defects may have existed in the way of service, etc., have been cured by the general appearance by the United States. *Farrar and Brown* v. *United States,* 3 Pet. 459; *Thames & Mersey Ins. Co.* v. *United States,* 237 U. S. 19; *United States* v. *New York & O. S. S. Co.,* 216 Fed. 61 (C. C. A. 2d). It is submitted, therefore, that this Court has jurisdiction.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

MAY 1936.

APPENDIX

Act of February 26, 1881, c. 80, 21 Stat. 350, 351 (U. S. C., Title 24, Sec. 138 and note):

> SEC. 2. All pensions payable, or to be paid under this act, to pensioners who are inmates of the National Home for Disabled Volunteer Soldiers shall be paid to the treasurer or treasurers of said home, upon security given to the satisfaction of the managers to be disbursed for the benefit of the pensioners without deduction for fines or penalties under regulations to be established by the managers of the home; said payment to be made by the pension agent upon a certificate of the proper officer of the home that the pensioner is an inmate thereof and is still living. Any balance of the pension which may remain at the date of the pensioner's discharge shall be paid over to him; and in case of his death at the home, the same shall be paid to the widow, or children or in default of either to his legal representatives.

Act of August 7, 1882, c. 433, 22 Stat. 302, 322, 323:

> * * * And section two of the act entitled "An act making appropriations for the payment of invalid and other pensions of the United States for the fiscal year ending June thirtieth, eighteen hundred and eighty-two, and for deficiencies, and for other purposes," approved February twenty-sixth, eighteen hundred and eighty-one, is hereby revived and continued in force.

Act of August 17, 1912, c. 301, 37 Stat. 311, 313 (U. S. C., Title 38, Sec. 52):

> SEC. 6. That nothing in this Act shall be construed as amending or repealing that portion of the sundry civil appropriation Act for the fiscal year eighteen hundred and eighty-three (Statutes at Large, Volume Twenty-two, page three hundred and twenty-two) concerning the payment of pensions due inmates of the National Home for Disabled Volunteer Soldiers.

Act of March 3, 1883, c. 130, 22 Stat. 564 (U. S. C., Title 24, Sec. 52).

> SEC. 4. That any inmate of the Home who is receiving a pension from the government, and who has a child, wife, or parent living, shall be entitled, by filing with the pension agent from whom he receives his money a written direction to that effect, to have his pension, or any part of it, paid to such child, wife, or parent. The pensions of all who now are or shall hereafter become inmates of the Home, except such as shall be assigned as aforesaid, shall be paid to the treasurer of the Home. The money thus derived shall not become a part of the funds of the Home, but shall be held by the treasurer in trust for the pensioner to whom it would otherwise have been paid, and such part of it as shall not sooner have been paid to him shall be paid to him on his discharge from the institution. The board of commissioners may from time to time pay over to any inmate such part of his pension-money as they think best for his interest and consistent with the discipline and good order of the Home, but such pensioner shall not be entitled to demand or have the same

so long as he remains an inmate of the Home. In case of the death of any pensioner, any pension money due him and remaining in the hands of the treasurer shall be paid to his legal heirs, if demand is made within three years; otherwise the same shall escheat to the Home.

Act of July 1, 1902, c. 1351, 32 Stat. 552, 564 (U. S. C., Title 24, Sec. 139):

Hereafter any balance of pension money due a member of the National Home for Disabled Volunteer Soldiers at the time of his death shall be paid to his widow, minor children or dependent mother or father in the order named, and should no widow, minor child, or dependent parent be discovered within one year from the time of the death of the pensioner, said balance shall be paid to the post fund of the Branch of said National Home of which the pensioner was a member at the time of his death, to be used for the common benefit of the members of the Home under the direction of the Board of Managers, subject to future reclamation by the relatives hereinbefore designated, upon application filed with the Board of Managers within five years after the pensioner's death.

Act of June 25, 1910, c. 384, 36 Stat. 703, 736 (U. S. C., Title 24, Sec. 136):

Hereafter the application of any person for membership in the National Home for Disabled Volunteer Soldiers and the admission of the applicant thereunder shall be and constitute a valid and binding contract between such applicant and the Board of Managers of said home that on the death of said

applicant while a member of such home, leaving no heirs at law nor next of kin, all personal property owned by said applicant at the time of his death, including money or choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived, shall vest in and become the property of said Board of Managers for the sole use and benefit of the post fund of said home, the proceeds to be disposed of and distributed among the several branches as may be ordered by said Board of Managers, and that all personal property of said applicant shall, upon his death, while a member, at once pass to and vest in said Board of Managers, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after the death of such member. The Board of Managers is directed to so change the form of application for membership as to give reasonable notice of this provision to each applicant and as to contain the consent of the applicant to accept membership upon the conditions herein provided.

Act of July 3, 1930, c. 863, 46 Stat. 1016, 1017 (U. S. C., Title 38, Sec. 11d):

SEC. 5. (a) When the consolidation and coordination herein provided for shall have been effected in the Veterans' Administration the President shall so declare by proclamation or order, whereupon the corporation known as the National Home for Disabled Volunteer Soldiers and the Board of Managers shall cease to exist.

(b) All contracts and other valid and subsisting obligations of the corporation, the

National Home for Disabled Volunteer Soldiers, shall continue and be and become obligations of the United States, and the United States shall be considered as substituted for said corporation with respect to all such demands either by or against said corporation, unless and until they shall thereafter be superseded or discharged according to law. The outstanding obligations assumed by the United States by virtue of the provisions of this subdivision may be enforced by suit in the Court of Claims or in the district courts of the United States according to the ordinary provisions of law governing actions against the United States, and such courts shall have the power to enter judgment against the United States, with interest, in the same manner and to the same extent as if said corporation were party defendant. No such suit shall be maintained upon any cause of action existing at the time of the dissolution of said corporation or arising simultaneously therewith, unless brought within two years from the time of such dissolution.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 70

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, DANVILLE, ILLINOIS, THE VETERANS' ADMINISTRATION, ET AL., PETITIONERS

v.

HARVEY M. WOOD, AS ADMINISTRATOR OF THE ESTATE OF WALTER SEARLES, DECEASED

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Illinois (R. 18–23) is not officially reported. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 38) is reported in 81 F. (2d) 963.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered February 19, 1936. The petition for a writ of certiorari was filed on May 19, 1936, and was granted October 12, 1936. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an accumulated pension fund, credited to an inmate of the National Home for Disabled Volunteer Soldiers and standing in the treasury in the name of the treasurer of such Home, becomes payable to the post fund of such Home at the death of the inmate, who left surviving him no widow, minor children, dependent mother or father, or whether such fund is a part of the estate of the inmate which may upon his death be recovered by his administrator.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra,* pp. 18–22.

STATEMENT

On February 26, 1932, a suit was instituted both against the National Home for Disabled Volunteer Soldiers, Danville, Illinois, petitioner herein; the Veterans' Administration Home, Danville, Illinois; Ralph W. Jones, as accountant of the Veterans'

Administration Home, Danville, Illinois, and as Treasurer of the National Home for Disabled Volunteer Soldiers, Danville, Illinois; and Walter T. Christy, as Special Disbursing Agent of said Veterans' Administration Home, Danville, Illinois. Respondent, who was plaintiff therein, is administrator of the estate of Walter Searles, deceased, a pensioner (R. 12). The facts, which were stipulated, may be summarized as follows:

Walter Searles, the decedent, was duly enrolled as a member of the National Home for Disabled Volunteer Soldiers at Danville, Illinois, on October 19, 1924. Thereafter, until his death on September 16, 1926, certain amounts granted and allowed him under the pension laws of the United States were paid in installments of $72.00 per month to the Treasurer of the Danville branch of the National Home for Volunteer Soldiers (R. 13–14). At the time of his death there was on deposit to his credit with the Danville branch approximately $1,800, and at the time of the filing of the suit there remained, after certain deductions concerning which there was no question, the sum of $1,546.47 (R. 14). Walter Searles died intestate, leaving as his only heir at law a son, Herbert A. Searles, who was not a minor (R. 15).

Within one year following the death of Walter Searles, Herbert A. Searles, his legal heir, made demand upon the National Home for Disabled Volunteer Soldiers for the payment of the pension

fund (R. 16). Thereafter, on March 23, 1931, demand was made upon the Veterans' Administration by the respondent and by Herbert A. Searles for the allowance of the sum of money remaining in the hands of the Veterans' Administration or its proper officials as accrued pension money due Walter Searles (R. 15). On March 25, 1931, the Veterans' Administration refused to accede to this demand (R. 16).

On January 26, 1935, the District Court entered judgment against the petitioners, the National Home for Disabled Volunteer Soldiers, Danville, Illinois, and the Veterans' Administration,[1] in the sum of $2,184.63, which represented the sum on deposit with the treasurer of the home plus interest, and costs of the suit. Judgment was not entered against the Veterans' Administration Home, Danville, Illinois, or against Ralph W. Jones or Walter T. Christy (R. 26). On appeal this judgment was modified by refusing to allow respondent costs, and, as modified, affirmed (R. 42).

SPECIFICATION OF ERRORS

The court below erred:

1. In holding that on the death of an inmate of a National Home for Disabled Volunteer Soldiers without leaving a widow, minor children, or de-

[1] The Veterans' Administration had not been joined as a defendant. See *infra*, pp. 12–17.

pendent mother or father surviving him, accrued pension money in the hands of the treasurer of the home passed to the inmate's administrator, and not to the post fund of the Home.

2. In holding that the Act of June 25, 1910, and not the Act of July 1, 1902, controlled the disposition of such fund.

3. In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

I

The Act of July 1, 1902, *infra,* p. 20, provides that any balance of pension money due a member of the National Home for Disabled Volunteer Soldiers at the time of his death shall, in the absence of a specified class of beneficiaries, pass to the post fund of the Home. The money here involved, which was held by the treasurer of the Home for a deceased pensioner, retained its character as pension money, and, the specified beneficiaries being absent, passed to the post fund under the 1902 Act.

The court below, however, held that the 1902 Act has been repealed, *pro tanto,* by the Act of June 25, 1910, *infra,* p. 20, which required an applicant for membership in the Home to agree that upon his death all his personal property held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived, should pass to the Board of Managers of the Home,

subject to being reclaimed by any person entitled thereto within five years. This Act, we submit, did not repeal the 1902 Act. Repeals by implication are not favored. In respect of pension moneys, Congress has consistently limited the beneficiaries of a deceased pensioner. The 1910 Act was intended to reach different property, namely, funds other than those in the hands of the treasurer of the Home. Both the legislative history of the 1910 Act and a consistent administrative interpretation show that the 1902 Act rather than the 1910 Act controls the disposition of the fund in the present case.

II

The suit was instituted against the National Home for Disabled Volunteer Soldiers and the Veterans' Home at Danville, Illinois. The National Home for Disabled Volunteer Soldiers has been dissolved, its functions assumed by the Veterans' Administration, and its obligations by the United States. However, the United States defended the suit both in the District Court and in the Circuit Court of Appeals, although its name did not appear in the caption of the case as a defendant. The judgment, however, is, in effect, a judgment against the United States. Any procedural deficiencies were waived by the general appearance of the United States. These circumstances, we submit, are sufficient to confer jurisdiction under the Tucker Act.

ARGUMENT

I

The Act of July 1, 1902, *infra*, p. 20, provides that any balance of pension moneys due a member of the National Home for Disabled Volunteer Soldiers at the time of his death shall be paid to his widow, minor children, or dependent mother or father in the order named, and that if no such person be discovered, such balance shall be paid to the post fund of the branch of the National Home of which the pensioner was a member at the time of his death.

It seems clear that the phrase "balance of pension money due" covers the fund here involved, i. e., money which has been paid to and is held by the Treasurer of the Home to be disbursed for the benefit of the pensioner. A similar use of the word "pension" is to be found in prior statutes. Section 2 of the Act of February 26, 1881, *infra*, p. 18, which first made provision for paying the pension of members to the treasurer of the Home, states that any balance of the "pension" which may remain at the date of the pensioner's discharge shall be paid over to him. Section 4 of the Act of March 3, 1883, *infra*, pp. 19–20, with reference to the fund in the hands of the treasurer, refers to it as "any pension money due" the member. Moreover, a pension retains its character as such at least until it has been reduced to possession by the pensioner. *Trotter* v. *Tennessee*, 290 U. S. 354, *McIntosh* v. *Aubrey*, 185 U. S. 122.

Admittedly, the deceased left surviving him neither wife, minor child, nor dependent mother or father. We submit, therefore, that the fund involved in the instant case constituted pension moneys due the deceased which, under the Act of July 1, 1902, passed to the post fund of the Home.

The court below, however, held that the Act of June 25, 1910, *infra,* p. 20, and not the Act of 1902, controlled the disposition of the fund. The 1910 Act provided that all applicants for membership be required to enter into a contract with the Home providing that when a member of the Home died, leaving no heirs at law or next of kin, all of his personal property, including money or choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived, should pass to the board of managers of the Home subject to being reclaimed within five years by any legatee or person entitled to take the same.

The Act of June 25, 1910, like the Act of July 1, 1902, constituted one of many enactments relating to the disposition of personal property of members of national homes for disabled volunteer soldiers. These statutes, we submit, should be read so as to give effect to each separate enactment in so far as they are not repugnant. While the court below spoke of the Act of 1910 as enlarging the persons who were able to take the balance of pension money due, nevertheless it, in effect, held that the Act of 1902 was repealed by implication. The law is, of

course, well settled that repeals by implication are not favored, and where two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, the duty of the court is, if possible, to give effect to both. *Frost* v. *Wenie,* 157 U. S. 46, 58. Cf. *Ex parte Webb,* 225 U. S. 663, 683; *Harford* v. *United States,* 8 Cranch. 109. We believe that these two statutes are not only capable of being but should be construed so as to give full effect to each.

While we have been unable to find any report or debate throwing light upon the legislative history of the Act of 1902, its purpose is plain: When a member of the Home died, pension money standing to his credit in the hands of the treasurer should pass only to certain designated individuals to whom the deceased might well be expected to owe a duty of support. Consistently this has been the legislative policy of Congress. For example, Section 25 of the Act of March 3, 1873, c. 234, 17 Stat. 566, 574, limited the beneficiaries of an accrued or unpaid pension, in the event of the death of a pensioner, to the wife and children below the age of sixteen years. It specifically provided that the pension should not constitute an asset of the estate of the deceased. The Act of March 2, 1895, c. 193, 28 Stat. 964 (U. S. C., Title 38, Sec. 96), reenacted this provision. It is even more evident why in the case of an inmate of the National Home for Disabled Volunteer Soldiers a limited class only was entitled to receive the accrued pension money in the hands of the treasurer of the Home. These Homes

are supported exclusively by public moneys of the United States, and the members thereof were required to pay no sum whatsoever for the care which they received therein. In these circumstances, it was reasonable and just for the Congress to provide that the accrued pension money of a deceased inmate should, in the absence of the limited class of beneficiaries set forth in the Act of 1902, pass to the post fund of the Home.

Some light, however, may be thrown upon the reasons which led to the enactment of the Act of June 25, 1910. Mr. Tawney of Minnesota, Chairman of the Appropriations Committee in charge of the bill, stated that many members of Homes were dying intestate, leaving no heirs. In many instances, these deceased members had large bank balances which were at times made a pretext for fictitious administration proceedings, and were subject to escheat to the State in which the Home was located. Recognizing that the character of these deposits was such that the Federal Government could exercise no direct legislative control over them, he stated that the only manner in which custody of such funds could be obtained was by a contract entered into by every applicant for membership of the Home, wherein the applicant would agree, in the event of his death intestate and without heirs, that such property should pass to the Home. Cong. Rec., Vol. 45, pp. 7011–7013, 7101.

Thus we have presented to us the patterns in which the statutes fit. The 1902 statute related

exclusively to pension moneys over which the United States had plenary control. The 1910 statute related to other assets over which the United States had no control whatsoever, and to reach which it was necessary to contract with an applicant for admission.

The administrative interpretation consistently has been that in the absence of the limited class specified in the Act of 1902, pension moneys in the hands of a treasurer of a home upon the death of a member passed to the home. 19 Comptroller of the Treasury 388 (1913); 4 Comp. Gen'l 752 (1925); 14 Comp. Gen'l 115 (1934). Administrative interpretations of long standing, while not binding, are entitled to great weight, as it may fairly be presumed therefrom that were such interpretations contrary to the legislative intent, remedial legislation would be enacted. *Costanzo* v. *Tillinghast,* 287 U. S. 341, 345; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492.

The court below treated the terms "proceeds of pension money" and "pension money" as being synonymous. This, we think, is clearly erroneous. Until pension money has been reduced to possession by the pensioner, it still retains its character as such. *Trotter* v. *Tennessee*; *McIntosh* v. *Aubrey, supra.* It is only after it has been reduced to possession and changed its form that it can be referred to as the "proceeds of pension money." Furthermore, the 1910 Act specifically refers to personal property owned at the time of the pen-

sioner's death, including money or choses in action held by him. Clearly, the deceased in this case did not hold the pension money. That money was held by the treasurer of the Home. It is apparent, therefore, that the 1910 Act did not, and could not have been intended to, relate to pension money held by the treasurer of the Home.

We submit that the decision of the Circuit Court of Appeals for the First Circuit, in *Durack* v. *National Home for Disabled Volunteer Soldiers,* 44 F. (2d) 516, constitutes the correct interpretation of the law. The court there held that the 1902 Act was controlling as to pension money in possession of the Treasurer of the Home at the time of the inmate's death, and distinguished the Act of 1910 as applying to all personal property in the possession of the inmate. The reason for the distinction between the two Acts in the class of persons entitled to receive before the post fund was deemed "too obvious to require comment." 44 F. (2d) 516, 517.

We contend that the decision of the court below was erroneous, that the 1902 Act exclusively related to the pension money, and that the 1910 Act related to personal property other than pension money. This contention, we believe, is borne out by the plain language of the statutes, as well as by the administrative interpretation which has been placed thereon for more than twenty years.

II

As was pointed out in the petition, the form of the proceedings in the present case is somewhat peculiar and requires comment. By the Act of July 3, 1930 (c. 863, 46 Stat. 1016; U. S. C., Title 38, Sec. 11d), *infra,* pp. 21–22, Congress provided that the corporation known as the National Home for Disabled Volunteer Soldiers should be consolidated with the United States Veterans Bureau and the Bureau of Pensions into the Veterans' Administration, and that when the consolidation was proclaimed by the President the corporation should cease to exist. Under date of June 21, 1930, the President issued this proclamation (Executive Order No. 5398), and from that date the corporation has had no existence, and all its assets have been in the possession of the Federal Government.

By Section 5 (b) of the Act of July 3, 1930, however, the United States assumed all the valid and subsisting obligations of the defunct corporation, and provided that the obligations might be enforced—

> * * * by suit in the Court of Claims or in the district courts of the United States according to the ordinary provisions of law governing actions against the United States, and such courts shall have the power to enter judgment against the United States, with interest, in the same manner and to the same extent as if said corporation were party defendant.

When respondent filed his declaration on February 26, 1932 (R. 5), he did not name the United States as defendant, as he should have done had he followed the literal requirements of the Act. However, he did advert to the fact that the corporation was—

> * * * dissolved and all its duties, obligations, rights, powers, etc., transferred to the Veterans' Administration of the City of Washington, District of Columbia, as a part of the Government of the United States. (R. 5.)

This may be taken as an indirect and inartistic way of making the United States, through the Veterans' Administration, a party defendant, even though not named in the caption. It seems to have been so construed by the trial judge, who directed that the judgment run against the defunct corporation and the Veterans' Administration (R. 26) which he apparently considered to be the Government as represented by that branch most directly concerned with the administration of veterans' affairs. Moreover, it seems to have been so interpreted by the United States Attorney, who thereafter proceeded in the name of the United States of America (R. 26, 27, 28, 29, 31).

However, even if the United States was not thus made a party, nevertheless the District Court and this Court have jurisdiction of the present case. The action is, according to the caption, against the defunct corporation, the Veterans' Administration

Home, which is merely a group of buildings having no independent legal status, and two persons holding positions under the United States, in their official capacities. Actually, however, the suit has been treated as one in which the United States was the real party defendant; indeed, in the motion for a new trial (R 25), and in all subsequent proceedings, action has been taken in the name of the United States of America (see R. 26, 27, 28, 29, 31). Any judgment entered in favor of respondent would of necessity be a judgment against the United States, which now has possession of all the assets of the defunct corporation, including those claimed in the present case (Act of July 3, 1930, c. 863, 46 Stat. 1016; U. S. C., Title 38, Sec. 11d), for the individuals were not sued in their individual capacity, and no judgment was entered against them in either capacity (R. 26). As the court below pointed out in its opinion (R. 41), petitioners urged in opposition to the allowance of interest and costs that the suit was in fact one against the United States, and on this basis succeeded in having costs eliminated from the judgment of the District Court (R. 42). In such circumstances it is submitted that the court below was correct in holding that the suit, although formally against others, was in fact against the United States. Cf. *Minnesota* v. *Hitchcock*, 185 U. S. 373; *State Highway Commission of Wyoming* v. *Utah Construction Co.*, 278

U. S. 194; *United States* v. *Golden,* 34 F. (2d) 367, 376 (C. C. A., 10th); *Schroeder* v. *Davis,* 32 F. (2d) 454 (C. C. A., 8th).

A similar situation was presented in *Minnesota* v. *Hitchcock,* 185 U. S. 373. An original suit was there brought in this Court by the State of Minnesota against the Secretary of the Interior and the Commissioner of the General Land Office, to enjoin them from selling certain lands. The court found that it had jurisdiction, basing its conclusion upon the fact that the United States, although not named as a party, was in fact the real defendant in the action, and that the Constitution extends the judicial power of the United States to controversies "to which the United States shall be a party." The Court, in other words, treated the case as one against the United States, even though it was not named as defendant.[2] Cf. *United States Fidelity & Guaranty Co.* v. *Kenyon,* 204 U. S. 349, and cases cited. The same rule has been applied in cases in

[2] The force of this analogy is not weakened by the opinion in *Williams* v. *United States*, 289 U. S. 553, 568, 572, which stated that *Minnesota* v. *Hitchcock* was erroneous in holding that the judicial power granted under Article III extended to suits to which the United States was a defendant, even if it had consented. There is no intimation in the *Williams* case that it disapproved of the fact that the United States was treated as the actual defendant even though not named as a party. Nor does the statement in the *Williams* case deprive this Court of appellate jurisdiction to review decisions of lower courts entered against the United States with its consent, for they exercise a judicial power, even though it is not derived from Article III of the Constitution. See 289 U. S. at 579–581.

which the jurisdiction of the Federal court rests upon diversity of citizenship. Jurisdiction there depends upon whether the citizenship of the real parties in interest is diverse, and formal parties of record will be ignored, both to sustain jurisdiction (*Wormley* v. *Wormley,* 8 Wheat. 421; *Browne* v. *Strode,* 5 Cranch 303) and to deny it (*Mitchell* v. *Maurer,* 293 U. S. 237, 242).

Applying the principle of these cases to the present action, the jurisdiction of the lower courts and of this Court rests upon the fact that it is actually one against the United States. Jurisdiction over such suits has been expressly vested in the district courts by the Act of July 3, 1930, *infra,* pp. 21–22, and by the Tucker Act (Act of March 3, 1887, c. 359, 24 Stat. 505; U. S. C., Title 28, Sec. 41, par. 20). Whatever formal defects may have existed in the way of service, etc., have been cured by the general appearance by the United States. *Farrar and Brown* v. *United States,* 3 Pet. 459; *Thames & Mersey Ins. Co.* v. *United States,* 237 U. S. 19; *United States* v. *New York & O. S. S. Co.,* 216 Fed. 61 (C. C. A. 2d). It is submitted, therefore, that this Court has jurisdiction.

CONCLUSION

We respectfully submit that the decision of the court below is erroneous and should be reversed.

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OCTOBER 1936.

APPENDIX

Act of February 26, 1881, c. 80, 21 Stat. 350, 351 (U. S. C., Title 24, Sec. 138 and note):

> SEC. 2. All pensions payable, or to be paid under this act, to pensioners who are inmates of the National Home for Disabled Volunteer Soldiers shall be paid to the treasurer or treasurers of said home, upon security given to the satisfaction of the managers to be disbursed for the benefit of the pensioners without deduction for fines or penalties under regulations to be established by the managers of the home; said payment to be made by the pension agent upon a certificate of the proper officer of the home that the pensioner is an inmate thereof and is still living. Any balance of the pension which may remain at the date of the pensioner's discharge shall be paid over to him; and in case of his death at the home, the same shall be paid to the widow, or children or in default of either to his legal representatives.

Act of August 7, 1882, c. 433, 22 Stat. 302, 322, 323:

> * * * And section two of the act entitled "An act making appropriations for the payment of invalid and other pensions of the United States for the fiscal year ending June thirtieth, eighteen hundred and eighty-two, and for deficiencies, and for other purposes", approved February twenty-six, eighteen hundred and eighty-one, is hereby revived and continued in force.

Act of August 17, 1912, c. 301, 37 Stat. 311, 313 (U. S. C., Title 38, Sec. 52):

> SEC. 6. That nothing in this Act shall be construed as amending or repealing that portion of the sundry civil appropriation Act for the fiscal year eighteen hundred and eighty-three (Statutes at Large, Volume twenty-two, page three hundred and twenty-two) concerning the payment of pensions due inmates of the National Home for Disabled Volunteer Soldiers.

Act of March 3, 1883, c. 130, 22 Stat. 564 (U. S. C., Title 24, Sec. 52):

> SEC. 4. That any inmate of the Home who is receiving a pension from the government, and who has a child, wife, or parent living, shall be entitled, by filing with the pension agent from whom he receives his money a written direction to that effect, to have his pension, or any part of it, paid to such child, wife, or parent. The pensions of all who now are or shall hereafter become inmates of the Home, except such as shall be assigned as aforesaid, shall be paid to the treasurer of the Home. The money thus derived shall not become a part of the funds of the Home, but shall be held by the treasurer in trust for the pensioner to whom it would otherwise have been paid, and such part of it as shall not sooner have been paid to him shall be paid to him on his discharge from the institution. The board of commissioners may from time to time pay over to any inmate such part of his pension-money as they think best for his interest and consistent with the discipline and good order of the Home, but such pensioner shall not be entitled to demand or have the same

so long as he remains an inmate of the Home. In case of the death of any pensioner, any pension money due him and remaining in the hands of the treasurer shall be paid to his legal heirs, if demand is made within three years; otherwise the same shall escheat to the Home.

Act of July 1, 1902, c. 1351, 32 Stat. 552, 564 (U. S. C., Title 24, Sec. 139):

Hereafter any balance of pension money due a member of the National Home for Disabled Volunteer Soldiers at the time of his death shall be paid to his widow, minor children or dependent mother or father in the order named, and should no widow, minor child, or dependent parent be discovered within one year from the time of the death of the pensioner, said balance shall be paid to the post fund of the Branch of said National Home of which the pensioner was a member at the time of his death, to be used for the common benefit of the members of the Home under the direction of the Board of Managers, subject to future reclamation by the relatives hereinbefore designated, upon application filed with the Board of Managers within five years after the pensioner's death.

Act of June 25, 1910, c. 384, 36 Stat. 703, 736 (U. S. C., Title 24, Sec. 136):

Hereafter the application of any person for membership in the National Home for Disabled Volunteer Soldiers and the admission of the applicant thereunder shall be and constitute a valid and binding contract between such applicant and the Board of Managers of said home that on the death of said applicant while a member of such

home, leaving no heirs at law nor next of kin, all personal property owned by said applicant at the time of his death, including money or choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived, shall vest in and become the property of said Board of Managers for the sole use and benefit of the post fund of said home, the proceeds to be disposed of and distributed among the several branches as may be ordered by said Board of Managers, and that all personal property of said applicant shall, upon his death, while a member, at once pass to and vest in said Board of Managers, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after the death of such member. The Board of Managers is directed to so change the form of application for membership as to give reasonable notice of this provision to each applicant and as to contain the consent of the applicant to accept membership upon the conditions herein provided.

Act of July 3, 1930, c. 863, 46 Stat. 1016, 1017 (U. S. C., Title 38, Sec. 11d):

SEC. 5. (a) When the consolidation and coordination herein provided for shall have been effected in the Veterans' Administration the President shall so declare by proclamation or order, whereupon the corporation known as the National Home for Disabled Volunteer Soldiers and the Board of Managers shall cease to exist.

(b) All contracts and other valid and subsisting obligations of the corporation, the National Home for Disabled Volunteer Soldiers, shall continue and be and become obli-

gations of the United States, and the United States shall be considered as substituted for said corporation with respect to all such demands either by or against said corporation, unless and until they shall thereafter be superseded or discharged according to law. The outstanding obligations assumed by the United States by virtue of the provisions of this subdivision may be enforced by suit in the Court of Claims or in the district courts of the United States according to the ordinary provisions of law governing actions against the United States, and such courts shall have the power to enter judgment against the United States, with interest, in the same manner and to the same extent as if said corporation were party defendant. No such suit shall be maintained upon any cause of action existing at the time of the dissolution of said corporation or arising simultaneously therewith, unless brought within two years from the time of such dissolution.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 70

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, DANVILLE, ILLINOIS, THE VETERANS' ADMINISTRATION, ET AL., PETITIONERS

v.

HARVEY M. WOOD, AS ADMINISTRATOR OF THE ESTATE OF WALTER SEARLES, DECEASED, RESPONDENT

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE RESPONDENT

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THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, DANVILLE, ILLINOIS, THE VETERANS' ADMINISTRATION, ET AL., PETITIONERS

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HARVEY M. WOOD, AS ADMINISTRATOR OF THE ESTATE OF WALTER SEARLES, DECEASED, RESPONDENT

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE RESPONDENT

A STATEMENT OF THE FACTS.

There were several facts omitted in the statement of the petitioners which the respondent believes desirable to call to this court's attention.

Walter Searles, the deceased pensioner, entered the Danville Home upon October 17, 1924. At the time of entering the home, he was required to, and did, enter into the following contract with the National Home for Disabled Volunteer Soldiers, a corporation:

"I agree that in the event of my death while a member of the National Home for Disabled Volunteer Soldiers, leav-

ing no heirs at law or next of kin, all personal property owned by me at the time of my death, including money or choses in action held by me and not disposed of by will, whether such property be the proceeds of pension or otherwise derived, shall vest in and become the property of the Board of Managers of the National Home for D. V. S. for the sole use and benefit of the post fund of said Home, and that all my personal property shall upon my death, while a member, at once pass to and vest in said Board of Managers, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after my death."

Mr. Searles died on September 16, 1926 and at his death there was on deposit to his credit with the Treasurer of the Danville Home the sum of approximately $1800.00. Prior to Mr. Searles' death the Home Treasurer had expended from time to time from such funds small amounts of money for incidental expenses of Mr. Searles while in the hospital. As of October 1, 1926 the sum of $1546.47 remained in the hands of the Home Treasurer, the balance having been paid by him to the child and to the sister of the deceased pensioner for their expenses in attending the funeral of decedent. These expenditures were made by the Home Treasurer apparently under the Rules and Regulations of the Home.

Prior to coming to the Danville Home, Mr. Searles had been in other such Homes, where he had received his pension from time to time. These moneys had been given to his son, Herbert A. Searles, who was permanently dependent upon him for support. Mr. Searles desired and expected his son to receive all his pension moneys and other property. That the pension moneys paid the Danville Home Treasurer were not given to his son was due to the fact that Mr.

Searles was an invalid patient in the hospital during his entire residence in the Danville Home.

All of the above facts are undisputed and are contained in the agreed statement of facts filed in this cause. (Rec. pp. 12-17.)

CONTESTED ISSUES.

IS THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT CONTRARY TO LAW?

A. Does Section 139 or Section 136 of Title 24, U. S. Code, control the disposition of the funds in controversy?

B. Did Section 139, when passed in 1902 repeal by implication a portion of Section 138 as such section existed at such time?

C. Did Section 136, passed in 1910, repeal by implication the entire section 139, passed in 1902, and a portion of Section 138?

D. Is the corporation and its successor estopped to deny the validity of the contract entered into between it and the deceased pensioner in conformity with Section 136?

E. Is Section 139 unconstitutional?

SUMMARY OF ARGUMENT

A pensioner possesses a vested right in pension moneys which have become due him; and where such moneys have been paid to a branch treasurer of one of the National Homes for Disabled Volunteer Soldiers, or a Veteran's Administrative Facility for disbursement to the pensioner for his benefit, the Treasurer becomes Trustee of such funds, the pensioner continuing to have a vested right to the funds in the nature of a chose or right in action ..... (pp. 5-10)

Such part of these funds as may remain in the hands of the Treasurer at the death of the pensioner pass to the pensioner's heirs at law or next of kin, by virtue of an harmonious construction of Sections 136, 138 and 139 of Title 24, U. S. Code ..... (10-22)

and also by virtue of a contract existing between the pensioner and the Home ..... (22-24)

That in order for Section 139 to control the disposition of such funds, a portion of Sections 136 and 138 must be found to have been repealed by implication ..... (pp.16, 31)

That Section 139, so construed, would be unconstitutional, the section containing an arbitrary and unreasonable classification, also a direct deprivation of property, both being obnoxious to the due process clause of the Fifth Amendment to the Constitution of the United States; the section further containing an unlawful attempt by Congress to govern a matter not within its power, that of the descent of the property of a citizen and resident of the State of Illinois ..... (pp. 25-30)

ARGUMENT

I.

PENSION MONEYS WHICH HAVE BECOME DUE A PENSIONER AND WHICH HAVE BEEN PAID OVER TO A BRANCH TREASURER OF THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, A CORPORATION, FOR DISBURSEMENT TO THE PENSIONER OR FOR HIS BENEFIT CONSTITUTE FUNDS IN THE NATURE OF PERSONAL PROPERTY OWNED BY THE PENSIONER, THE TREASURER BEING THE MERE TRUSTEE OR DEPOSITARY OF THE FUNDS FOR THE PENSIONER.

In order to determine the proper disposition of the funds in controversy, it is very essential to attempt to determine the legal status of such funds. Section 138, Title 24, U. S. C., distinctly states that all pensions payable or to be paid to members of any of the branch homes of the National Home for Disabled Volunteer Soldiers, shall be paid to the Treasurer of such Home to be disbursed for the benefit of the pensioners under the Rules and Regulations of the Home; the payments to be made to the Branch Treasurer through the Bureau of Pensions upon a certificate by him that the pensioner is an inmate of the Home *on the day to which said pension is drawn.* Section 51, Title 38, U. S. C., provides that all pensions are to be paid to pensioners *once each month.*

In complying with the provisions of the foregoing sections, the Bureau of Pensions requires the Branch Treasurers of the several Branches of the National Home for Disabled Volunteer Soldiers to issue their certificates each month to the Bureau of Pensions showing that there is due

Note: Wherever the words "Home Treasurer" or "Branch Treasurer" are hereafter used the same refer to the Treasurer of the Danville, Illinois, branch of the National Home for Disabled Volunteer Soldiers, a corporation, or its successor, the Veterans' Administration.

References to United States Statutes utilize Title and Section Numbers of U. S. Code. More specific designation thereof will be found in Appendix A.

the specified pensioners residing in their respective Homes upon a specified day of each month a certain sum of money. The aggregate sums so certified are then submitted to the Secretary of the Treasury of the United States, who pays such sum to the Bureau of Pensions which in turn places upon deposit in the United States Treasury or other depository to the credit of each of the several Branch Treasurers the sum of money so specified by them. Section 138 also provides that the Branch Treasurer shall give adequate security for the proper payment of the pensions so received by them for disbursement to the pensioner.

The two sections apparently contemplate that the money received by the Home Treasurer belongs to the pensioner and is to be disbursed to him, the only discretion resting in the Home being as to the manner in which the disbursement should be made. So far as the actual ownership of the money is concerned, it seems obvious that no Rules and Regulations of the Home could change its status. Even under such Rules and Regulations, however, (see Stipulation of Facts, paragraph 10, Rec. 16), the Home recognized that these funds were in fact the pensioner's, and that the Treasurer was merely the trustee or custodian of them, and could retain them temporarily, only in the event that the member was sick or incompetent, and until he became well or was discharged from the Home, in which event they had to be paid to him; and even when he was in the hospital such rules provided that parts of the funds should be expended from time to time for his *incidental expenses, for his indebtedness, or to his relatives.*

In this case the Home Treasurer actually paid a part of such funds to the surgeon of the Home for incidental expenses of the pensioner while he was in the hospital, and also paid some $200.00 from such funds to Herbert Searles,

the pensioner's son, to defray his expenses in attending the funeral of his father. (Stip. of Facts, R. 14.)

It would seem clear that under these circumstances the pensioner possessed a vested right to such pensions *paid to* the treasurer for disbursement to him. The petitioners apparently contend, however, that by labeling the funds as "pensions" or "pension money" instead of "proceeds of pensions," the actual legal status of the funds is changed thereby, and that the funds continue to remain in the category of mere gratuities subject to disposition by Congress in whatever manner it deems fit. (See Pet. Brief, pp. 11-12.)

This contention proceeds upon two false assumptions:

First: That the moneys are unpaid by the U. S. Government.

Second: That the pensioner does not possess a vested right in such pension moneys.

A mere reading of the Statutes reveals the falsity of the first assumption. Section 138, Title 24, specifically provides that such moneys are to be paid to the *treasurer of the Home* for disbursement to the pensioner. This, of itself, negatives the theory that such pensions are *unpaid* by the Government. Without such fact being in evidence, we assume that the Branch Treasurer has, in this case, deposited such funds *received* by him in the U. S. Treasury. The U. S. Treasury, however, is a mere depository of the funds, and use of it was purely optional with the Treasurer of the Home, since he could have used any *Bank* (properly qualified therefor) for such purpose had he so desired. (See Section 117, Title 24, U. S. C.)

That the United States Government, as such, is relieved of all liability for such funds once they have been paid to

the Branch Treasurer is specifically held in the case of Edward O'Mara, Administrator, vs. U. S., 47 U. S. Court of Claims 27, in which case the Administrator of the decedent sued the United States for the recovery of $928.00 which was paid by the pension agent to the Treasurer of the Branch Home prior to the death of the pensioner, and which fund was held by the Home Treasurer at the time of the pensioner's death. The money was demanded from the Branch Treasurer and the National Home for Disabled Volunteer Soldiers, and the demand refused. The Court held that the corporation had power to take, hold, and convey personal and real property and to sue and be sued in courts of law and equity, and that inasmuch as the United States had paid to the proper party (the Branch Treasurer) the pension fund due the pensioner, that it could not be held liable for the debt, which it did not owe—and that any controversy would necessarily have to be between the Administrator and the Branch Treasurer, for the corporation of which he was an official.

The second erroneous assumption proceeds from the failure to apprehend that these funds are not such pension moneys as accrue during the interim between the time of application and allowance of a pension, but are the *accumulations* from an *allowed* pension, in which the several *payments*, having become *due*, have been actually paid by the Government. In the former case the pensioner has a mere *expectancy* until the pension has been allowed; in the latter case, the pensioner has a *vested right* in the pensions which have actually become due. This distinction has been stated generally as follows: "Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. On the other hand, a mere expectancy of future benefit does

not constitute a vested right. (12 Corpus Juris, p. 955; Cooley, Constitutional Law, p. 351; Fearne, Contingent Remainders, p. 1; Pearsall vs. Great Northern Railroad Co., 161 U. S. 646, 673; 40 L. Ed. 838; Jersey City Presb. vs. First Presb. Church, 80 NJL 572, 78 Atl. 207, 210.)

So it is, that although it is generally held that a pension to be paid in the future is a gratuity in the continuance of which the pensioner has no vested right, yet it is universally conceded that where any payment under a pension has become due, the pensioner has a vested right to it. (21 Ruling Case Law, Section 7 (p. 243). Pennie vs. Reis (1889) 132 U. S. 464, 33 L. Ed. 426, Ryan vs. Foreman, 262 Ill. 175; Kavanaugh vs. Police Pension Fund Comrs. (1901) 134 Cal. 50, 66 Pac. 36; Re Smith (1902) 130 N. C. 638, 41 S. E. 802; Smith vs. Alkin (1890) 80 Mich. 205, 45 N. W. 136.)

It is admitted that the funds in this case were pension moneys which had become *due*, for the Branch Treasurer had certified to such fact before the same were paid over to him. As to such *due payments* the pensioner would have possessed a vested right in them, even while unpaid and in possession of the Government. It is a noteworthy fact in this case, however, that except for the circumstance that Walter Searles, the pensioner, was an invalid in the hospital, *all of this pension must and would have been paid to him.* That he was unable to receive the pension immediately upon its payment to the Home Treasurer, cannot, however, affect his legal *right* to such moneys, and this right, being vested, constituted a chose or right in action as to such funds, which upon his death passed to his Administrator, the respondent herein, for the benefit of his only child.

We have not discussed, expressly, the proposition that the Treasurer is trustee of the funds of the pensioner.

That he does occupy such a position may be readily determined from a consideration of the following:

First: Section 138 expressly provides that the Treasurer shall receive the funds *for disbursement for the benefit of the pensioner;* which is in effect an express designation of a trust.

Second: Section 52, Title 24, U. S. C., providing for payments of pensions to inmates of the Soldiers Home at Washington, D. C., uses the same method for payment through the Home treasurer as is provided in Sec. 138, and by almost identical language, except that the treasurer is specifically required to hold such funds "*in trust*" for the pensioner.

Third: The funds are not the "*treasurer's*" or the "*Government's*" since the several sections of Title 24 expressly provide that the funds remaining in the Treasurer's hands upon the death of the pensioner shall be paid to the pensioner's heirs at law, or to other designated beneficiaries.*

II.

PERSONAL PROPERTY OWNED BY A MEMBER PENSIONER OF A BRANCH OF THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, A CORPORATION, OR ITS SUCCESSOR, THE VETERANS' ADMINISTRATION, AT THE TIME OF HIS DEATH PASSES TO HIS HEIRS AT LAW OR NEXT OF KIN, OR IF NO SUCH PERSONS EXIST, TO THE BOARD OF MANAGERS OF SAID CORPORATION, OR ITS SUCCESSOR.

In order to construe Sections 136, 138 and 139 of Title 24, U. S. C., it is necessary to consider the history of the legislation concerning the disposition of such pension funds

*For a discussion of the rules determining trusts as applied to this case, see Perry, Trusts and Trustees, (7th Edition), Chap. 1—Sections 1, 2, 25, 26, 27; Chap. 2—Sections 30, 31, 39, 60, 67; Chap. 4—Section 112; Chap. 6—Section 166; Chap. 27—Section 828.

as are involved in this cause. Section 138, as enacted in 1881 and amended in 1882 provided that pension moneys due members of the home were to be paid to the *Treasurer* of such home to be disbursed to, or for the benefit of, the pensioners, and also provided that *any balance* of the pension which *might remain* at the *date* of the pensioner's discharge should be paid over to him, and in case of his death at the home, the same should be paid to the widow or children or in default of either, to his legal representatives. This was then the only existing provision concerning the disposition of any pension moneys or other personal property owned by a pensioner dying at the National Soldiers Home. We feel that there can be no doubt that the funds referred to in this section of the statute were the funds, if any, *remaining in the hands of the Treasurer of the Home at the date* of the Pensioner's death. The Circuit Court of Appeals in the case cited by the petitioner (Durack vs. National Home for Disabled Volunteer Soldiers, 44 Fed. (2d) 516) expressly recognizes this construction, as do also the several opinions of the Comptroller General dealing with this subject.

No additional enactments were made until the year *1902* at which time Section 139, Title 24 USC was enacted, which provided that "any balance of pension money due a member of the National Home for Disabled Volunteer Soldiers at the time of his death shall be paid to his widow, minor children or dependent mother or father in the order named . . ." (This statute does not contain the word "hereafter" as set forth in the Court's opinion, 44 Fed. 2d, page 516, or in petitioner's brief, p. 20.)

No amendment was made to Section 138 at this time, nor was it repealed by any specific enactment, and such section still contained the express provision that any balance

of the pension funds *remaining* in the hands of the *Branch* Treasurer at the date of the pensioner's death was to be paid to his widow or children or to his legal representatives.

Subsequent to the passage of Section 139, Congress on June 25, 1910, enacted Section 136, Title 24, U. S. C., which provided that a pensioner upon entering a National Home for Disabled Volunteer Soldiers should enter into a contract with the Home whereby he should agree that upon his death at such home leaving no heirs at law or next of kin, all personal property owned by him at his death, including money or choses in action held by him, whether such property be the proceeds of pensions or otherwise derived, should vest in and become the property of the Board of Managers of such Home for the uses and benefit of the Post Fund of the Home, and that all of his personal property should upon his death pass to such Board of Managers, subject to be reclaimed by any legatee or heir at law within five years after the pensioner's death. Following the passage of Section 136, and upon August 17, 1912, the present Section 138 was re-enacted, omitting the last clause of such section as previously enacted, which provided for the disposition of any balance of pension moneys remaining with the Branch Treasurer at the time of the pensioner's death. It was expressly provided, however, in the Act of August 17, 1912, c. 301, Section 6, 37 Stat. 313, that nothing therein should be construed as amending or repealing 22 Stat. 322 concerning the payment of pensions due inmates of the National Home for Disabled Volunteer Soldiers; the latter statute being Section 138 as originally enacted.

We feel that Congress in enacting Section 139, which was passed without any controversy in Congress concerning it, intended that such Section was to cover the parts of the month's pension which had become due a member at

the time of his death, but had not yet been paid to the Home Treasurer, which in this case amounted to the sum of $28.80, and that Section 138, Title 24, U. S. C., as then in force and effect, adequately covered the balance of the pension moneys *remaining* in the hands of the Treasurer at the time of the member's death. Examined closely, Section 139 is found not to contain any reference to funds already paid to a *Treasurer* of the Home or a balance *remaining* with a Treasurer of the Home, whereas Section 138 deals specifically with funds previously paid to a *Treasurer* of a Home and remaining in his hands at the time of a pensioner's death. Thus construed, there is no conflict between the two sections.

In the first place, it is important to notice that Section 139 applies only to a *balance of pension money due a member at the time of his death*. Suppose the member had left the home just prior to his death. Upon being discharged from the Home, the pensioner would be entitled to receive all pension moneys in the hands of the branch treasurer (Sec. 138, Title 24). This is not only provided for in the act itself, but also under the rules and regulations of the Home. **(R. 16-17.)** It is apparent that if Mr. Searles had left the home only 12 days prior to the date of his death, he would have been entitled to receive the entire sum of money in the hands of the branch treasurer at such time which, however, *would not have included the $28.80 which was a balance of pension money due the pensioner* but which had not yet become payable to, or been turned over to, the branch treasurer—such sum of money being still in the hands of the United States Government. Assume further that Mr. Searles had then returned to the Home, but had died before the ensuing month's pension was payable. Such sum—in this case $28.80, would have been a "balance of pension money due a member at the time of his death," strictly within the meaning of Section 139.

Again, contrast this section with Sec. 138, and it is seen that whereas Sec. 139 disposes of any *balance of pension money due the member at the date of his death only*, Sec. 138 disposes of any "balance of pension moneys which *remain* at the date of the pensioner's *discharge* or *death*."

Sec. 138 clearly applies to accumulated pension moneys in the hands of the branch treasurer, since he does not possess any balance of pension money due the member for a part of a month; and if the word "*remain*" is to be given any effect the Section can only apply to funds already received. Sec. 139, conversely, contains no reference whatsoever to any balance of pension moneys *remaining* with the Treasurer at any specified time, but only to "pension moneys due a member at the date of his death." In addition, whereas Sec. 138, refers particularly to moneys previously paid to the *Treasurer* of the Home—Sec. 139 contains no words which would indicate that the "balance of pension moneys" referred to therein are funds previously paid to, or in the hands of, the *Treasurer*. From the omission of any such words, it would seem that the intention was to make this section applicable to such sums of moneys as had not, at the date of the pensioner's discharge or death, been paid to such treasurer.

This conclusion seems inescapable when sections 138 and 139 are considered in conjunction with an analogous section, that of Section 52, Title 24, U. S. C. This latter section provides for the payment of pensions to inmates of the Soldiers Home at Washington, D. C.; the procedure being almost identical with that provided for the payment of pensions of inmates of the National Soldiers Home. This section, after expressly providing that such pensions shall not become a part of the funds of the Home but shall be held by the Treasurer *in trust* for the pensioner to whom it would otherwise have been paid directly, provides:

> "In case of the death of any pensioner any pension money due him and remaining in the hands of the Treasurer shall be paid to his legal heirs."

Here again we have a specific reference to funds *due* the pensioner and *remaining* in the hands of the *Treasurer* at the time of the pensioner's death. This section still applies to such funds in the hands of the Treasurer of the Soldiers Home at Washington, D. C., of which home, Walter Searles, the pensioner in this case, *might have been a member had he so desired.* It is obvious that such section is almost identical with Section 138 as it existed prior to its re-enactment in 1912, and it is noteworthy that Section 138 was not so re-enacted until *after* Section 136 was enacted in 1910 making provision for the disposition of such funds. There is no section analogous to Section 136 applying to funds in the hands of the Treasurer of the Soldiers Home at Washington, D. C.

It is a well recognized rule in the construction of statutes in pari materia that the court will attempt to harmonize the various provisions of the statute, whenever possible. The courts have stated the law on such matters as follows:

> "Statutes in pari materia are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the sub-

ject matter has been changed or modified from time to time. With this purpose in view therefore it is proper to consider, not only acts passed at the same session of the legislature, but also acts passed at prior and subsequent sessions, and even those which have been repealed. So far as reasonably possible the several statutes, although seemingly in conflict with each other, should be harmonized, and force and effect given to each, as it will not be presumed that the legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms; nor will it be presumed that the legislature intended to leave on the statute books two contradictory enactments. 36 Cyc. 1147; U. S. vs. Colorado, etc. R. Co., 157 Fed. 321; People's U. S. Bank vs. Goodwin, 162 Fed. 937.

"In the consideration of conflicting provisions in a statute, the great object to be kept in view is to ascertain the legislative intent, and a construction which best secures the rights of all the parties affected has been held a proper construction. In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions in the same statute, or in different statutes, the last in point of time prevails. 59 C. J. p. 999; Wells Fargo and Co. vs. Mayor and Aldermen of Jersey City, N. J. 207 Fed. 871 (1913); U. S. ex. rel. Hains vs. Daniels, 279 Fed. 844 (1922)."

The Court, in the case of Durack vs. National Home for Disabled Volunteer Soldiers, 44 Fed. (2) 516, relied upon by petitioners, felt that there was a conflict between Sections 138 and 139, and contrary to the established rules concerning the repeal of Statutes by implication, held that Section 139 repealed by implication that part of Section 138 dealing with the disposition of pension moneys remaining in the hands of the branch treasurer at the time of the member

pensioner's death, and held that all such funds should pass to the persons designated in Section 139. Without citing the many supporting cases, we call the court's attention to the rules governing repeal by implication as stated in 59 Corpus Juris pp. 905-908:

> "The repeal of statutes by implication is not favored. The courts are slow to hold that one statute has repealed another by implication, and they will not make such an adjudication if they can avoid doing so consistently, or on any reasonable hypothesis, or if they can arrive at another result by any construction which is fair and reasonable. Also, the courts will not enlarge the meaning of one act in order to hold that it repeals another by implication, nor will they adopt an interpretation leading to an adjudication of repeal by implication, unless it is inevitable, and a very clear and definite reason can be assigned. Nor will statutes be held repealed by implication unless a legislative intent to repeal or supersede the statute plainly and clearly appears. The implication must be *clear*, *necessary*, and *irresistible*." [Italics ours.]

At page 910, 59 C. J., it is stated:

> "A statute may repeal an earlier one by implication where it covers the whole subject matter of, and is intended to be a substitute for, the earlier one, or where its provisions are so repugnant to those of the earlier statute as to make the two statutes irreconcilable. Generally speaking, these are the only ways in which a repeal by implication can take place."

Sec. 139 does not cover the whole subject matter of Section 138, nor are its provisions necessarily (nor even reasonably) repugnant to the provisions of Section 138. If Congress intended this section to do what the Circuit Court

of Appeals of the First Circuit held that it did do, it is difficult to understand why Congress did not re-enact Section 138 at that time, leaving off a part thereof so as to make such intention clear.

These two sections remained, however, with no further enactments concerning their subject matter until June 25, 1910, at which time Congress passed Section 136, Title 24, USC (Appendix A) which provided that the member upon entering a Home, should enter into an agreement whereby all of his personal property, including moneys and choses in action, etc., should pass to his legatees, heirs at law, or next of kin, with the further provision that at his death all of his said personal property should vest in the Board of Managers subject to be reclaimed by such legatees, heirs at law, or next of kin by a petition filed with the Board of Managers within five years after the member's death. It seems clear to us that it was the purpose of Congress in passing this Section, to amplify that part of Section 138 dealing with the funds of the pensioner in the hands of the Home Treasurer, for Section 136 covers *all* personal property including money and choses in action. Congress certainly understood that any pension moneys belonging to a pensioner, but for some reason or another remaining in the hands of the Home Treasurer, constituted a chose in action owned by the pensioner, and evidently meant to include in this enactment such funds as well as all other personal property owned by the pensioner at the time of his death. In essence, this statute provides that all personal property of the pensioner shall escheat to the United States in the event of the pensioner's death leaving no legatees, heirs at law, or next of kin, and was accordingly drawn so as to cover all of his per-

sonal property.*† It was only *after this statute* was passed that Congress later and in 1912 re-enacted Section 138, omitting the clause providing for the disposition of the pension money remaining in the hands of the Home Treasurer at the time of a member's death.

The petitioners (Pet. Brief pp. 11-12) have attempted to distinguish between pension money paid to a pensioner by the Home Treasurer and on deposit in a bank or other depository, and those sums remaining in the hands of the Home Treasurer, calling the former "proceeds of pension" and the latter "pensions." The decisions of the Comptroller of the Treasury and Comptroller General cited by the petitioners (Pet. Brief, p. 11) do not *sustain* this distinction.

In XIX Comp. Treas. 388 (January 4, 1913), an attempt was made to construe Sections 136 and 139. The Comptroller of the Treasury first discussed Sec. 139, (Act of July 1, 1902) holding that it applied to all pension money in the hands of the Home Treasurer. He then discussed Sec. 136 (Act of June 25, 1910) referring to it as containing two provisions, the first vesting all personal property of the deceased pensioner in the Board of Managers, the second as authorizing the reclamation of such property by any legatees, or heirs at law, of such deceased pensioner, and said:

> "It will be observed that the first provision of this later act applies to 'all personal property*** whether such property be the proceeds of pensions or otherwise derived.' Hence said property evidently includes the pension money referred to in the act of July 1, 1902, SUPRA, and I think the term 'all personal property,' as used in the second

*Note: The analogous Section 52, Title 24, specifically provides that if demand for the funds are not made within a specified time, they shall **escheat** to the **home.**

†That the congressional committee believed, when proposing this legislation, that such was its purpose and effect, see Appendix B, Infra.

provision, must also be construed to include said pension money."

In 4 Comp. Gen'l. 752 (1925) another attempt was made to construe Sections 136 and 139. In this opinion the Comptroller General stated that Section 136 applied only to the "personal effects" of the deceased member, and that Section 139 applied not only to money held by the Treasurer but also to money paid to the pensioner and in his possession or on deposit in a bank or other depository.

The untenability of the petitioners' contention that Section 136 was designed to cover the *"personal effects"* only of the pensioner, (see Pet. Brief, pp. 9-11) is shown by the fact that the Section specifically refers to "choses in action" which in their very nature are not *personal effects;* and by the further fact that provisions had already been enacted for disposition of such property. Sec. 137, Title 24, makes all such members of the Home subject to the Articles of War, in the same manner as if they were in the Army. Sec. 1584, Title 10, (being Article 112 of the Articles of War), specifically provides for the disposition of the personal effects of all those persons subject to the Articles of War, (and it is noteworthy that this section also provides that the next of kin shall receive such property).

Although the Circuit Court of Appeals in the instant case did not hold that Section 139 was repealed by implication we believe that if any of the various statutes involved in the subject matter of this case, might reasonably be considered as so repealed, then Section 139, passed in 1902, might well be considered as repealed by implication upon the enactment of Section 136 (1910), for in the event that the pensioner has a vested right to pension moneys for a *part of a month* which have not yet been paid either to him or to the Home Treasurer, then the pensioner would have a chose or right in action to recover such pension

moneys so due him, which right would also pass to his heirs at law or next of kin under Section 136. Section 136 would, therefore, cover the entire subject matter of Section 139, as well as that of Section 138 concerning the disposition of pension moneys *remaining* in the hands of the Home Treasurer at the time of a pensioner's death.

It is difficult to know exactly what Congress did intend when passing these several statutes. It seems reasonable to suppose, however, that Congress did not intend to take away from a child of a pensioner the personal property owned by such pensioner at his death. *We believe that Congress did not have this right, except by contract with the pensioner,** even had it so intended, since such property would pass to the heirs at law or next of kin of such pensioner in accordance with the laws of the State in which he resided. Funds which belonged to him whether such funds were deposited in a Bank, invested in stocks, or left with the Treasurer of the Home, all constituted personal property in the nature of choses in action owned by him. Congress might have intended, however, to provide some method via contract, for the disposition of all such property in the event that such pensioner left no heirs at law or next of kin, and this it did by means of Section 136.

A question might very well arise, however, concerning pension moneys in the course of accrual which had never been paid to the pensioner, or which had never been paid to the Home Treasurer. As to such moneys, Congress might be held to control the disposition, inasmuch as it is questionable whether the pensioner owned a right or chose in action as to them. It seems obvious that he could not recover such part of a month's pension by any action or proceeding, inasmuch as the same did not become payable to him except

*This was also the opinion of the Congressional Committee, when the provision was discussed in committee. (Appendix B.)

upon the 4th day of each month. Upon this basis such funds not being a chose in action or other personal property covered by the provision of Section 136 some different provision might be necessary. Such provision, we feel, was made for such funds in the enactment of Section 139.

If these enactments be so construed, then, without doing conflicts to any of their provisions, and without resorting to any repeal by implication, we find that under Section 139 pension moneys for parts of a month which had accrued in the hands of the Treasurer of the United States but had not yet become legally *due* the pensioner, would be paid in accordance with the provisions of Section 139, Title 24, whereas all other personal property including choses in action, which in turn would include funds or pension moneys legally *due* the pensioner and in fact already paid by the United States Government to an officer of a separate corporation, or as now, to a bonded officer of the Veterans' Administration, to be disbursed to the pensioner, would be disposed of in accordance with Section 136, Title 24.

III.

THE FUNDS IN CONTROVERSY BELONG TO THE RESPONDENT BY VIRTUE OF THE CONTRACT BETWEEN WALTER SEARLES, THE DECEASED PENSIONER, AND THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, A CORPORATION.

There is a further reason why Sections 136, 138 and 139, Title 24, should be harmoniously construed as contended by respondent. There can be no doubt that the deceased pensioner, when entering the Home, believed when induced to sign the agreement referred to in Section 136, that such agreement meant just what it said, and that "moneys or choses in action, whether the same be proceeds

of pensions or otherwise derived," included his pension moneys which had been, or would be, paid to the Home Treasurer for disbursement to him. Almost any lawyer would have so informed him had he inquired concerning it. Now, then, should a *corporation* doing an act, not only within its powers, but doing such act by express legislative enactment, be permitted to escape the fair and reasonable obligations of such contract? We believe not.

It must be remembered that the funds in controversy are not those of the Government, but are moneys in the nature of a *trust fund* which at the time of payment in this cause were placed in the hands of *a bonded officer* of a corporation. The United States Government, *as such,* expressly disclaimed any rights to such fund. (See case of Edward O'Mara, Adm. vs. United States, 47 U. S. Court of Claims, 27 supra.) The only way in which the corporation could possibly claim any right to such funds after a pensioner's death must be by way of a contractual relation. This relation does in fact exist, and by a plain, fair and obvious construction thereof, the respondent is entitled to the funds, since the agreement provides that such property shall pass to the pensioner's heirs at law or next of kin. To reach the conclusions contended for by petitioners (apparently by the court in 44 Fed. 2nd 516) requires not only a strained technical construction of the statutes, but an entire disregard of the pensioner's contract. Otherwise stated, such a result is obtained by receiving the advantages of misrepresentations. (See Stipulation of Facts, Sec. 7, Rec. 15, showing intention of pensioner that *all* of his pension moneys should pass to his son, Herbert Searles.)

Even were the statute (Sec. 136) not in force, so that Section 139 might, by a not too involved species of reasoning, be held to apply to the funds in question, yet the con-

tract entered into by the National Home for Disabled Volunteer Soldiers should be enforced in favor of the respondent as here contended. Under such circumstances, the corporation, having made a valid contract, should be held estopped from setting up the Statute to defeat its obligation. In 10 R. C. L. Sec. 46 (p. 724) it is stated: "Estoppels, technically so-called, and estoppels in pais, operate both for and against corporations"; and Sec. 111, p. 799: "A party proposing the terms of a contract cannot be heard to object to them, and when a party has executed a written contract he is estopped to deny its terms." (See also 21 C. J. pp. 1110-1111.) Even were the United States, instead of the corporation, the original party to the contract, instead merely of succeeding to the rights and obligations of the corporation, it also would be estopped. (See 10 R. C. L. Sec. 31, p. 704):

> "It is quite settled that when the state makes itself a party to an action or contract or grant in its proprietary capacity, it is subject to the law of estoppel, as other parties litigant, or other contracting parties. And so, a state department in a matter of procedure and within the scope of departmental powers, may be estopped."

While discussing this provision in committee, the members seriously debated the propriety and legality thereof, finally concluding that the contractual relationship proposed offered the only feasible method of controlling all of the personal property of a deceased member and escaping the laws of escheat of the several States in which the "Homes" were located. The committee were agreed that the provision clearly covered all personal property, including all pension moneys, and that the "Home" should not receive the property except in those cases in which the member died, leaving no legatee or heir at law. (See Appendix B *infra*.)

IV.

SECTION 139, TITLE 24, IF CONSTRUED TO APPLY TO THE FUNDS IN CONTROVERSY, IS UNCONSTITUTIONAL, BEING CONTRARY TO THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The petitioners contend that Sec. 139 should be so construed as to apply, not only to that part of a month's pension not payable to the pensioner or Home Treasurer at the time of the member's death, but also to all pension money paid over to the Home Treasurer by the Bureau of Pensions, for disbursement to the pensioner and standing to the credit of the pensioner in the U. S. Treasury or some other depository at the date of the pensioner's death. The respondent believes that if the section be so construed it is rendered unconstitutional and void.

It is a fundamental proposition that the Federal Government has only those powers granted to it by the Constitution and that the States have all of those powers not specifically granted to the Federal Government nor specifically prohibited to the States. The power of regulating the descent of property is one which has neither been granted to the Federal Government nor prohibited to the States. The Statutes of the State of Illinois govern the descent of the personal property of the deceased pensioner, and by such laws the respondent is entitled to such property for the benefit of the pensioner's child, Herbert Searles, (See par. 7, Stip. of Facts, Rec. 15.)

It is a well recognized rule that all property in which a person possesses a vested right at the time of his death passes to his legatees, devisees, heirs at law or next of kin or to his Administrator or Executor for their benefit (subject to taxes and payment of such deceased persons' debts). We have previously shown that the pensioner in this case

possessed a vested right in and to the pension moneys *paid* by the Government to the Branch Treasurer to be disbursed to him. That a vested right in an obligation constitutes a chose or right in action would appear to be a proposition so fundamental as not to merit citation of authority. However, we cite for the convenience of the court the following definitions of a chose in action:

> "Chose in action is a known legal expression used to describe personal rights of property which can only be claimed or enforced by action and not by taking legal possession." Wm. Searle Holdsworth, 33 Harvard Law Review, 997. (For a similar definition see Arthur L. Corbin, 77 Pa. Law Review, 207.)

In 50 Corpus Juris 764, it is stated:

> "A chose in action means, literally, a thing in action, and is the right of bringing an action, or a right to recover a debt or money or a right of proceeding in a court of law to procure the payment of a sum of money, or as it is many times defined by statutes, a right to recover money or personal property by a judicial proceeding." (Citing many cases.)

Vested rights in the nature of choses in action are property, and the Federal Government has been denied the right to deprive a person of property without due process of law by the 5th amendment to the Constitution of the United States.

To constitute a deprivation of property without due process it is not necessary that there be an actual physical taking of the property, but it is sufficient if its free use and enjoyment is affected; if the owner be deprived of the power of disposition of it; or if he be deprived of any of its essential attributes. (Osborn vs. Nicholson, 13 Wall.

654; 20 L. Ed. 689; 6 R. C. L. p. 473 and cases cited). So it has been held that the right to transmit property to one's descendants or next of kin is "property", within the meaning of the provision of the Constitution. (Dibrell vs. Lanier, 89 Tenn. 497; 15 S. W. 87).

Without entering upon any lengthy discussion of the proposition, it is clear that Congress would have no power to deprive the pensioner, Walter Searles, of his vested rights in the pension moneys, which have actually been paid over to him through payment made to his agent for disbursement, the Treasurer of the Home of which he was a member; nor does Congress have power to deprive him of the right to transmit such property to his heirs, or next of kin.

It appears to be just as clear that Congress cannot arbitrarily deprive the pensioner's only child and heir at law of such property which is his by operation of the laws of descent of the State of Illinois. This was quite plainly the consensus of opinion of the committee when drafting Sec. 136, providing that the pensioner should enter into a contract with the "Home" when admitted thereto, providing for the disposition of his personal property, including funds such as those involved herein. (See Appendix B.)

There is, however, an even more cogent reason why Sec. 139, if construed as contended by petitioners, should be held unconstitutional as contrary to the "due process" clause of the Fifth Amendment. Due process of law guaranteed by the federal constitution has been defined in terms of the equal protection of the laws, that is, as being secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. In order that a statute may comply

with the necessary requirements as to due process of law, it must not violate the limitations as to classification imposed by the constitutional inhibition as to the denial of the equal protection of the laws. Thus the test with respect to the requirement of due process of law, seems to be that if the law under consideration operates equally upon all who come within the class to be *affected*, embracing all persons who are or may be in *like situation* and *circumstances*, and the designation of the class is *reasonable*, not unjust or capricious or arbitrary, but based upon a real distinction, the law does operate uniformly, and if, added to this, the law is enforced by usual and appropriate methods, the requirement as to "due process of law" is satisfied. (Caldwell vs. Texas, 137 U. S. 692, 34 L. Ed. 816; Leeper vs. Texas, 139 U. S. 462, 35 L. Ed. 225; Maxwell vs. Dow, 176 U. S. 581, 44 L. Ed. 597.)

One of the essential requirements as to classification, is that the classification must not be capricious or arbitrary, but must be reasonable and natural or must be based on some natural principal of public policy. The legislature cannot arbitrarily create a class, and when thus created make it binding on the courts so that they would be bound to accept such classification as a proper one. (Gulf C. & S. F. R. vs. Ellis, 165 U. S. 150; 41 L. Ed. 666; Connolly vs. Union Sewer Pipe Co., 184 U. S. 540; 46 L. Ed. 679; Atchison T. & S. F. R. Co. vs. Matthews, 174 U. S. 96; 43 L. Ed. 909; Seaboard Air Line Ry. vs. Seegers, 207 U. S. 73; 52 L. Ed. 108; Southern Ry. Co. vs. Greene, 216 U. S. 400; 54 L. Ed. 536.)

The court, in holding void a statute assessing attorneys' fees against certain corporations in a certain class of actions, said, in Gulf C. & S. F. R. Co. vs. Ellis, 165 U. S. 150:

> "Classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorneys' fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classifications. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Section 139 is in form a statute of descent and escheat. Assuming for the purpose of this argument that Congress had power to govern the descent of the property described in such section, the classification adopted is highly arbitrary and capricious, entirely unadapted to the purpose intended. This *purpose* was evidently to give to the *needy* heirs of the decedent the specified property, since the widow, minor children and dependent mother or father, in the order named, inherit only. On no other basis can the discrimination against other children, or brothers or sisters, or other heirs, be explained.

It is questionable, even, that *need* is the basis of the classification, since the widow or minor children may be in affluent circumstances, yet they would take under the statute prior to dependent parents. However, assuming that need is the basis, and that it is also a reasonable one, yet the statute *unreasonably* discriminates against a class of heirs —the *adult dependent* children of a deceased pensioner— who *should* take such property prior to the dependent parents of such decedent, or in any event should not be prohibited from inheriting on the same basis as their younger brothers and sisters, their mother, or their grandparents.

The statutes of descent of the State of Illinois permit children of a decedent to inherit in preference to a parent, and *Congress* itself has shown that it considers an *adult dependent* child of a pensioner to be in a favored class.

Section 45, Title 38, U. S. C., provides that the Commissioner of pensions may, where a pensioner has deserted his wife, (who is in necessitous circumstances), minor children, or permanently dependent child, pay over to such persons one-half the pensioner's pension.

Section 46, Title 38, U. S. C., provides:

> "If any such pensioner shall become an inmate of a national soldiers' home one-half of the pension drawn in his behalf or to which he may become entitled during his residence therein shall be paid by the treasurer of that institution to such pensioner's wife, she being in necessitous circumstances and a woman of good moral character, or, if there be no wife, to the legal guardian of the minor child or children, or the *permanently dependent* and helpless child or children of such pensioner, on the order of the Commissioner of Pensions. [Italics ours.]

A similar provision for such relatives of a pensioner in a State Soldiers or Sailors home is also in effect (Sec. 47, Title 38, U. S. C.)

The respondent represents the only child of the deceased pensioner, who, although an adult, is admittedly *permanently* helpless, and was *dependent* upon his father for support. This support was in fact given until the pensioner was placed in the Home hospital, the Home Treasurer retaining the funds which the pensioner had previously sent to his son.

The classification contained in Sec. 139, which denies to a *dependent adult child* of a pensioner, property which

dependent parents, or a widow or minor children who are not even dependent, can receive, is so obviously arbitrary, unreasonable and discriminatory that it amounts to a denial to the appellee of the equal protection of the laws as guaranteed by the "due process" clause of the Fifth Amendment to the Constitution, and Sec. 139 is thereby rendered unconstitutional, if the same be held to govern personal property occupying the status of that involved in the cause herein.

V.

THE DECISION OF THE COURT IN THE CASE OF DURACK V. NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, 44 FED. (2) 516, IS ERRONEOUS.

Without considering, directly, the decision of the court in the case of Durack vs. National Home for Disabled Volunteer Soldiers, 44 Fed. (2nd) 516, which decision petitioners urge this court to accept as a correct statement of the law, (Pet. Brief, p. 12), we have attempted in this brief to reveal the errors of such court in its construction of the statutes involved. Such errors, we believe, are as follows:

First: The court held that Section 139, passed in 1902, repealed by implication a part of Section 138. The court, in such construction:

A. Failed to apprehend that the two sections concerned, or could be reasonably construed to concern, entirely different matters—Section 138 referring to pension moneys already paid to the Home Treasurer and *remaining* in his hands at the time of the pensioner's death, and Section 139 referring to a balance of pension money not yet paid over to the Home Treasurer at the time the pensioner died.

B. Failed to abide by the established rules concerning repeal by implication, in that:

1. No legislative intent was shown to repeal Section 138 by implication. (Nothing in the Congressional Record discloses any such intention.)

2. Section 139 does not cover the entire subject matter of Section 138.

3. Section 139 is not clearly, necessarily or irresistibly repugnant to, or in conflict with Section 138.

4. The two sections can reasonably be harmoniously construed together.

Second: The Court held that Section 136 did not affect the disposition of these funds. This holding was erroneous, because:

A. Section 136 specifically covered the funds in question whereas Section 139 covers such funds only by inference.

1. The funds were a *chose in action* disposed of by Section 136.

2. Section 139 does not mention any funds *remaining* in any *Treasurer's* hands.

B. Section 136 was passed in 1910, subsequent to the passage of Section 139 (in 1902). This is important, because:

1. Section 136 expressly covers the disposition of these funds, which was previously expressly covered only by Section 138.

2. Congress *intended* Section 136 to cover these funds, and intended Section 138 to cover them until the passage of Section 136, because:

a. Section 138 as enacted in 1881 and 1882 and in force until 1912 admittedly covers the funds.

b. Congress did not indicate, by any debates during the passage of Section 139, nor by any express repeal of a part of Section 138, that it intended any repeal of Section 138.

c. However, shortly *after* the passage of Section 136, Congress did, in re-enacting Sec. 138, omit that part of such Section dealing with these funds.

d. The congressional committee, in discussing Sec. 136, prior to its enactment, specifically agreed that this section would cover such funds. (Appendix B.)

C. Section 136 can reasonably be held to repeal by implication the clause in Section 138 relating to these funds, and probably also Section 139.

1. Section 136 covers the entire subject matter of the disposition of these funds following the death of a member pensioner.

2. The clause in Section 138 covering such funds, as it existed prior to the passage of Section 136, is *clearly repugnant* to Section 136, the *later* statute.

3. Congress, by omitting such clause in Section 138, when re-enacting it, shortly following the passage of Section 136, confirmed the inference that Section 136 had been intended when passed to repeal the clause in Section 138.

4. If the moneys referred to in Section 139 be considered a chose in action owned by the pensioner at his death, then:

a. Section 139 should be held repealed by Section 136, the *later* statute, since Section 136 specifically covers the *entire* subject matter of Section 139, and is repugnant thereto.

b. Section 139 should be held void and unconstitutional, being contrary to the 5th Amendment of the Constitution of the United States.

1. The legislation concerns a vested right, which is property.

2. Congress has no right to deprive a person of property without due process of law.

3. Congress has no power to govern the descent of property.

4. The classification contained in the section is arbitrary, unreasonable and discriminatory.

5. If the moneys referred to in Section 139 be not considered a chose in action, then the Section can apply only to that part of the month's pension not paid over to the Home Treasurer at the date of the pensioner's death, and such section does not cover the funds in question, and its provisions do not pertain to the same subject matter and is not repugnant to Section 136.

Third: The court overlooked the significance of the contract between the Home and the pensioner.

A. The contract was between a corporation and the pensioner.

B. The contract was valid, being expressly authorized by the granting power (Congress).

C. The contract specifically covered the funds in ques-

tion. (It included *all* personal property of the pensioner, including choses in action.)

D. An attempt by the corporation to circumvent the obligations of the contract by resorting to the provisions of a statute other than the one under which the contract was executed would be an admission of misrepresentation by the corporation.

E. A corporation is estopped from denying the obligations of a valid contract, and is estopped from taking advantage of its own misrepresentations.

F. Assuming that the Veterans' Administration is now the successor to the corporation, and is a branch of the government, it is made, by statute, subject to the obligations of the corporation; and in addition, is also subject to the same rules of estoppel.

Fourth: The Court failed to consider the "probative" force of certain analogous and allied statutes.

A. Section 52, Title 24, provides that the heirs at law or next of kin of a deceased member of the "Soldiers' Home" at Washington, D. C., shall be entitled to his pension moneys *remaining* with the Treasurer of the Home.

1. Walter Searles, the deceased pensioner, might have been a member of said home, had he so desired.

2. As such member the funds in controversy would pass to the respondent.

B. Section 23, Title 24, also provides that the heirs at law or next of kin of a deceased member of the "Naval Home" at Philadelphia, Pennsylvania, shall be entitled to his pension moneys *remaining* with the Treasurer of the Home.

CONCLUSION

The respondent respectfully submits that the funds in controversy constituted pension moneys which had, prior to the death of the pensioner, become due, and that upon such due date the pensioner possessed a vested right in such funds; that Section 138, Title 24, by virture of its express provisions, and by analogy with a kindred section, that of Section 52, Title 24, specifically made such funds, when received by the Home Treasurer, trust funds; that upon such funds being paid to the Home Treasurer the pensioner possessed a vested right to them, such vested right being in the nature of a chose in action; that upon the death of the pensioner, that portion of the funds which had not been disbursed to or for the benefit of the pensioner prior to his death, but still remained in the hands of the treasurer, passed to the heirs at law or next of kin of the pensioner, in accordance with Section 136, Title 24, and the contract entered into between the Home and the pensioner by virtue of such section.

The respondent further submits that Section 138, Title 24 controlled the disposition of such funds until the enactment of Section 136, upon July 25, 1910; that Section 139 was not intended, when passed, (July 1, 1902) to have any application to funds which had already been paid to a home treasurer for disbursement to an inmate of the home, but applied only to such part of a month's pension as had accrued in the hands of the United States Treasurer between the date of the last payment to the home treasurer and the pensioner's death; that upon the enactment of Section 136, such section superseded the provision of Section 138 applying to the disbursement of pension moneys following the death of a member pensioner, and that Section 136 has, since the date of its enactment, controlled the disposition of

all pension moneys *paid* to the home treasurer, for disbursement to the pensioner, prior to the pensioner's death.

The respondent believes that such construction of the several sections is in accordance with the rules of law governing the repeal of statutes by implication, since no statute, excepting a portion of Section 138, is thereby repealed by implication, and such repeal continued for only two years when Congress re-enacted Section 138, omitting the clause so repealed by implication. By virtue of such construction, Section 139 does not apply to pension moneys in which the pensioner or his heirs at law possessed a vested right, and can, therefore, be held constitutional, whereas if Section 139 were to be construed as contended by the Petitioners herein, such section would be unconstitutional as contrary to the due process clause of the fifth amendment to the Constitution of the United States.

The Respondent therefore respectfully submits that the judgment of the court below was in accordance with the law, and that such judgment should be affirmed.

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APPENDIX A.

(1) Section 138, Title 24, U. S. Code. This section as originally passed February 26, 1881 was as follows:

> "All pensions payable, or to be paid under this act, to pensioners who are inmates of the National Home for Disabled Volunteer Soldiers shall be paid to the Treasurer or Treasurers of said Home, upon security given to the satisfaction of the managers to be disbursed for the benefit of the pensioners without deduction for fines or penalties under regulations to be established by the managers of the home; said payment to be made by the pension agent upon a certificate of the proper officer of the home that the pensioner is an inmate thereof and is still living. Any balance of the pension which may remain at the date of the pensioner's discharge shall be paid over to him; and in case of his death at the home, the same shall be paid to the widow, or children, or in default of either to his legal representatives." (Sec. 2 of Act of February 26, 1881, c. 80, 21 Stat. 350, 351.)

This section was amended by Act of August 7, 1882, c. 433, 22 Stat. 302, 322, 323, but the provisions thereof were specifically revived in such Act. No further amendments were thereafter made until August 17, 1912, when the Act was amended to read as follows:

> "All pensions and arrears of pensions payable or to be paid to pensioners who are or may become inmates of the National Home for Disabled Volunteer Soldiers shall be paid to the Treasurers of said home, to be disbursed for the benefit of the pensioners without deduction for fines or penalties, under the rules and regulations of said home. Said payments shall be made by

the Bureau of Pensions upon a certificate of the proper officer of the Home that the pensioner is an inmate thereof on the day to which said pension is drawn. The Treasurers of said home, respectively, shall give security, to the satisfaction of the managers of said home, for the payment and application by them of all arrears of pension and pension moneys they may receive under the aforesaid provision. Any balance of the pension which may remain at the date of the pensioner's discharge shall be paid over to him. (Feb. 26, 1881, c. 80, No. 2, 21 Stat. 350; Aug. 7, 1882, c. 433, No. 1, 22 Stat. 322; Aug. 17, 1912, c. 301, No. 1, 37 Stat. 312.)"

(2) Section 139, Title 24, U. S. Code, passed July 1, 1902:

"Any balance of pension money due a member of the National Home for Disabled Volunteer Soldiers at the time of his death shall be paid to his widow, minor children or dependent mother or father in the order named, and should no widow, minor child, or dependent parent be discovered within one year from the time of the death of the pensioner, said balance shall be paid to the post fund of the branch of said national home of which the pensioner was a member at the time of his death, to be used for the common benefit of the members of the home under the direction of the Board of Managers, subject to future reclamation by the relatives designated in this section upon application filed with the Board of Managers within five years after the pensioner's death. (July 1, 1902, c. 1351, Sec. 1, 32 Stat. 564.)"

(3) Section 136, Title 24, U. S. Code, passed June 25, 1910:

"The application of any person for membership in the National Home for Disabled Volunteer

Soldiers and the admission of the applicant thereunder shall be and constitute a valid and binding contract between such applicant and the Board of Managers of said home that on the death of said applicant while a member of such home, leaving no heirs at law nor next of kin, all personal property owned by said applicant at the time of his death, including money or choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived, shall vest in and become the property of said Board of Managers for the sole use and benefit of the post fund of said home, the proceeds to be disposed of and distributed among the several branches as may be ordered by said Board of Managers, and that all personal property of said applicant shall, upon his death, while a member, at once pass to and vest in said Board of Managers, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after the death of such member. The Board of Managers is directed to so change the form of application for membership as to give reasonable notice of this provision to each applicant, and as to contain the consent of the applicant to accept membership upon the conditions provided in this section. (June 25, 1910, c. 384, Sec. 1, 36 Stat. 736.)"

APPENDIX B.

Discussion by Congressional Committee upon May 27 and May 28, 1910, concerning Act of June 25, 1910, C. 384, 36 Stat. 736, Sec. 136, Title 24, U. S. C., found in Vol. 45, Part 7, pp. 7011-13, 7101 of the Congressional Records. (61st Congress, 2nd Session.)

MR. TAWNEY:

> "The reason for this provision is this— and I trust I may have the attention of the Committee, because this is a matter of considerable importance. At all of the homes there are a great many soldiers die, leaving on deposit in the banks of the city in which the home is located a certain amount of money. Now, if they die intestate and without heirs that money remains in the bank. Instances have occurred where men have fraudulently taken out letters of administration for the purpose of getting the money on deposit belonging to the soldier at the time of his death. At the Dayton Home in Ohio there is in the banks today over $30,000 unclaimed by relatives or heirs or legatees.
>
> "That fund is increasing, and the committee had information to the effect that the State of Ohio, proceeding under the law of escheat, was about to bring suit against the managers of the banks to recover that money for the benefit of the State. There is in the neighborhood of $30,000 on deposit in the banks of Milwaukee, and there are large sums of money on deposit, unclaimed, in the banks of the cities where all of the other homes are located. Now: Proceeding upon the theory that where the old soldier dies without heirs or legatees, he would rather that money which he leaves behind should be paid into the post fund for the benefit and comfort of his old comrades rather than allow it to go back to the State, of which he might not even be a citizen,

because these men who are in the home are not always citizens of the State in which the home is located; for that reason we have provided here, or we have incorporated this provision, so that in every case where the old soldier dies and leaves money on deposit, or other property undisposed of by will and unclaimed by legatees or heirs, that money shall be used for the benefit of his comrades and not go back to the State under the law of escheat.

"That is the reason for it, and that is all this provision accomplishes; and in order to make it legal this provision provides expressly that the form of application be so changed that every old soldier who applies for admission to one of these homes, in making out his application, is notified of this fact and his consent to the disposition of his money and property at the time of his death is obtained. *In no other way can we change the law of descent in the States.* I do not think there is a member of this House who can justly complain of or criticise the provision. It is in the interest of the old soldiers remaining here after their comrade has died without disposition of his property, that in that event his property, whatever it may consist of, may be deposited for the benefit of those old soldiers who are occupants of these homes."

MR. COX:

"I notice that the paragraph provides that the application shall constitute a binding and valid contract between the applicant and the Board of Managers, not only for the money that the soldier may have as a result of his pension, or the pension he may have remaining at the time of his death, but for all of his personal property. 'Is this proper legislation?' "

MR. TAWNEY:

"***That is not the effect of the provision. Judge Smith drew it, taking into account the fact that most states make provision for the settlement of estates of deceased soldiers. This provision would call to the attention of the applicant that if he *had no heirs*, or if he had not made a will disposing of his property, ***that he would have notice of the fact."

MR. COX:

"Am I right in construing the provision to mean that the application of the applicant seeking admission to the institution and his admission constitutes a binding contract for the disposition not only of the money he may have as the result of his pension, but of all personal property of which he may be the owner?"

MR. TAWNEY:

"As applied to members of the soldiers homes who die in the homes without disposing of their property by will or otherwise, or having no heirs."

MR. COX:

"But is it not made a matter prerequisite under the paragraph that before an individual can be admitted as an inmate, he must enter a contract bargaining away not only his pension, but his personal property?"

MR. TAWNEY:

"He is not bargaining it away at all. He is merely agreeing that in the event of his death while an inmate of the home, and in the event of his not disposing of the property himself, or of his having no heirs, rather than see his property and his money go to the state in which the home is located *****it shall be disposed of for the benefit of his comrades."

MR. COX:

"Does the provision carry all of the personal property that the old soldier may die the owner of while he is an inmate of the institution?"

MR. TAWNEY:

"Certainly. It carries personal property, which includes, of course, any money which he may have on deposit; but it carries it to the home only in the event of his death in the home, without heirs, and without having disposed of his property before death.

MR. KEIFER:

"******I have no trouble about the purpose and propriety of having the estate of deceased members of the National Soldiers Home go to the benefit of their comrades if they die as members intestate and without heirs. But I think it is well for us to look and see whether we can accomplish that purpose by this provision. It is an attempt by federal law to provide a new mode of disposing of an estate without regard to state law. It is an attempt to make, in effect at least, a statute of descent. * * * I think that if the contract is of a proper character it may do this, otherwise I think this provision will merely lead to litigation. The purpose of the bill is to cut off the right of the state to take the property that in legal effect escheats to the state."

(Discussion as to rights of creditors and concensus of opinion that home would only take what was left after all debts of pensioner were paid,—also as to sufficiency of contract and moral question as to whether the State or the institution is more entitled to the funds.)

MR. COX OF INDIANA:

"I do not believe we should offer the old

soldiers the necessity to bargain away the pittance he has. My idea is that he should enter the home free and untrammeled."

MR. KEIFER:

"You say the soldier is required to bargain away his property in advance. I do not understand that there is anything of the kind in the provision. On the contrary, he is only making a contract by which he keeps it from going to the state."

MR. COX:

"A man's property rights are absolute, sacred rights. I do not care if he has $5.00 or $5,000,000 worth of property, it is his."

MR. CULLAP:

"I will ask this question. Is it not fair to assume that under this provision any legatee legally entitled to the estate may come in after the death?"

MR. COX:

"That may be true. ****I am not clear, however, whether or not a soldier can make a will disposing of his estate after he enters the home.****"

MR. KEIFER:

"****I think the criticism that the soldier may be prevented from making a will by the provisions of the bill is not well taken. The bill allows a soldier at any time after he becomes a member of a home to make a will, and if he makes a will that disposes of his property even to a stranger, no matter whether *it disposes of pension money or other property that belongs to him, or if he dies and leaves anybody under the statutes of descent anywhere in the world to inherit it*, then the provision in the bill (that the institution should take the property) could have no application. The question simply is whether or not we can by proper

provision in this bill provide that the soldier shall or can bind himself to allow his estate after his death to go to a post fund of the home in which he is an inmate for the benefit of his surviving comrades in that home.

"I do not believe that we can change the statute of descent of any state, nor do I think we could prevent the estate of any deceased soldier under any contract from being administered upon by the laws of the state in which he was a resident at the time of his death. It would be only by such an appropriate provision as would give the post fund the right to claim it through administration. I was anxious to carry out the purpose of the provision, so that the old veteran soldier might have the consolation, *if he had no blood kin or relative anywhere in the world to inherit his personal estate, and if he did not exercise the right * * * to dispose of his property by will*, of knowing that when he died and left any personal property, however small, it would go to the comfort of other veteran soldiers who were inmates of the home of which he died a member.

(Italics and also matters in parentheses ours.)

SUPREME COURT OF THE UNITED STATES.

No. 70.—October Term, 1936.

The National Home for Disabled Volunteer Soldiers, Danville, Illinois, and the Veterans' Administration, Petitioners, *vs.* Harvey M. Wood, as Administrator of the Estate of Walter Searles, Deceased.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[December 7, 1936.]

Mr. Justice Butler delivered the opinion of the Court.

Decedent was an honorably discharged volunteer soldier of the Civil War. In 1904, he was allowed a pension. October 19, 1924, having made application and signed an agreement in accordance with the Act of June 25, 1910,[1] he was enrolled as a member and admitted to the Danville branch of the National Home for Disabled Volunteer Soldiers and continued to be an inmate until he died, September 16, 1926. During that period the United States paid his pension, in instalments of $72 per month, to the treasurer of the branch. He died intestate, leaving as his sole heir at law, a son over 21 years old. Respondent brought this action to recover $1546.47 of his pension money remaining in the hands of the treasurer after deductions as to which no question has been raised. The district court gave judgment for that amount with interest and costs. 9 F. Supp. 403. The Circuit Court of Appeals affirmed except as to costs.[2] 81 F. (2d) 963. That decision, being in conflict with one of the Circuit Court of Appeals for the First Circuit, *Durack* v. *National Home*, 44 F. (2d) 516, this court granted a writ of certiorari.

Petitioners raise a single question. They maintain that, since the decedent did not leave a widow, minor child or dependent mother

[1] 36 Stat. 736. 24 U. S. C., § 136.

[2] The Circuit Court of Appeals held: Although governmental agencies are named defendants, the suit is in fact one against the United States; § 5, Act of July 3, 1930, 46 Stat. 1017, 38 U. S. C., § 11d, permits allowance of interest against the United States, but costs should not have been allowed.

or father, the accumulated pension fund became payable at his death to the post fund of the Danville branch. If the Act of July 1, 1902,[3] governs, the balance belongs to the post fund. If, as held below, the Act of 1910 and the agreement made in accordance with it control, the administrator is entitled to recover.

Section 2 of the Act of February 26, 1881, provides: "All pensions payable . . . under this act, to pensioners who are inmates of the National Home for Disabled Volunteer Soldiers shall be paid to the treasurer . . . of said home . . . to be disbursed for the benefit of the pensioners . . . Any balance of the pension which may remain at the date of the pensioner's discharge shall be paid over to him; and in case of his death at the home, the same shall be paid to the widow, or children or, in default of either, to his legal representatives."[4]

Applicable to the pension money held by the branch were rules and regulations declaring: A pensioner, not classed as incompetent, may direct that all or any portion of his pension money be sent to his wife, minor child or dependent relative; the governor of a branch may prevent hurtful, wasteful or extravagant use of the pension money by retaining a sufficient amount until the danger has passed; pension money standing to the credit of a member sick in hospital will be paid directly to him in such amounts only as are necessary for his personal use; in the case of members classed as incompetent, payment of pension money may be made as follows: (a) to the surgeon in such sums as may be necessary for the personal expenses of the member (b) to a wife, minor child or dependent relative upon the authority of the president of the board of managers (c) to pay taxes, etc., when necessary to protect the interests of the member.[5]

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[3] 32 Stat. 564. 24 U. S. C., § 139.

[4] 21 Stat. 350. Section 2 is contained in an Act making appropriations to pay pensions for the fiscal year ending June 30, 1882. It was applicable only to pensions paid out of the money so appropriated. The Act of August 7, 1882, 22 Stat. 322, provided: "That all pensions and arrears of pensions payable or to be paid to pensioners who are or may become inmates of the National Home for Disabled Volunteer Soldiers shall be paid to the treasurers of said home, to be applied by such treasurers as provided by law, under the rules and regulations of said Home. . . . And section two of the act . . . approved February twenty-sixth, eighteen hundred and eighty-one, is hereby revived and continued in force." Cf. 24 U. S. C., § 138.

[5] Par. 253, Regulations of the National Home for Disabled Volunteer Soldiers, 1918, as amended.

The Act of July 1, 1902, provides:

"Hereafter any balance of pension money due a member of the National Home . . . at the time of his death shall be paid to his widow, minor children, or dependent mother or father in the order named, and should" none "be discovered within one year from the time of the death . . . said balance shall be paid to the post fund of the Branch . . . of which the pensioner was a member at the time of his death . . . subject to future reclamation by the relatives hereinbefore designated, upon application filed . . . within five years after the pensioner's death."[6]

Petitioners maintain, and for the purposes of this decision we assume without deciding, that the Act of 1902 relates to pension money paid to the treasurer of a national home for the use and benefit of a member and held by him at the time of the member's death. But it contains nothing that relates to use or disposition of the fund while the pensioner is alive. It relates exclusively to disposition of the balance in the hands of the treasurer at the time of death. In that respect alone, it conflicts with and supersedes the corresponding provisions of the Act of 1881.

The scope and effect of the Act of June 25, 1910, remains to be considered. It provides:

"Hereafter the application of any person for membership in the National Home . . . and the admission of the applicant thereunder shall be and constitute a valid and binding contract between such applicant and the Board of Managers of said home that on the death of said applicant while a member . . . leaving no heirs nor next of kin, all personal property owned by said applicant at the time of his death, including money or choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived, shall vest in and become the property of said Board . . . for the sole use and benefit of the

[6] Cf. § 4, Act of March 3, 1883, 22 Stat. 564, 24 U. S. C., § 52, prescribing regulations for the Soldiers' Home, Washington, D. C. It provides: ". . . . The pensions of all who . . . are . . . inmates of the Home . . . shall be paid to the treasurer of the Home. The money thus derived shall not become a part of the funds of the Home, but shall be held by the treasurer in trust for the pensioner . . . and such part of it as shall not sooner have been paid to him shall be paid to him on his discharge from the institution. . . . In case of the death of any pensioner, any pension money due him and remaining in the hands of the treasurer shall be paid to his legal heirs, if demand is made within three years; otherwise the same shall escheat to the Home."

post fund of said home . . . and that all personal property of said applicant shall, upon his death, while a member, at once pass to and vest in said Board . . . subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after the death of such member . . ."

Before that enactment, it was disclosed that in the National Home a substantial number of inmates died intestate and without heirs, leaving not only the balance of their pension money remaining in the hands of the branch treasurer but also money on deposit in banks. The Act directs the disposition of personal property left by members dying intestate and without heirs. Congress intended to vest in the board of managers for the post fund only that which, for lack of testamentary disposition and heirs at law, would be liable to escheat to the State. Whether the Act extends to the balance of decedent's pension money accumulated in the hands of the branch treasurer depends upon the meaning to be given to the words "all personal property owned by said applicant at the time of his death, including money or choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived." The words "all personal property" are broad enough to include his beneficial interest in the trust fund created by payments of his pension to the treasurer. The words "including money or choses in action" obviously do not exclude that money. There is nothing to suggest that the phrase "whether such property be the proceeds of pensions or otherwise derived" was intended to eliminate the pension money. It indicates purpose to extend not to restrict. Even if "proceeds of pensions" might be held to refer to something other than pension money, that meaning would have no tendency to exclude funds in the hands of the treasurer. The measure leaves the member free to dispose by will and safeguards to the legatees and heirs the right within five years to reclaim "all the property" that belonged to him at the time of his death. As to that, there is no ambiguity and therefore nothing to construe. To the extent that, in respect of disposition of the pension money in the hands of the treasurer at the time of the member's death, the Act of 1910 is inconsistent with the Act of 1902, the latter is superseded. It follows that respondent is entitled to the fund in question.

Affirmed.